No. 96-8653-CSY Title: Kevin D. Gray, Petitioner
Status: GRANTED v.
Maryland

Docketed: Court: Court of Appeals of Maryland
April 16, 1997

Counsel for petitioner: DeLano Jr.,Arthur A.

Counsel for respondent: Curran Jr.,J. Joseph

Entry	Date	Note	Proceedings and Orders
1	Apr 15 1997	G	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed. (Response due May 16, 1997)
3	May 12 1997		Brief of respondent Maryland in opposition filed.
4	May 28 1997		DISTRIBUTED. June 12, 1997 (Page 8)
6	Jun 16 1997		Petition GRANTED. SET FOR ARGUMENT December 8, 1997. **********
9	Jul 17 1997		Joint appendix filed.
8	Jul 21 1997		Order extending time to file brief of petitioner on the merits until August 14, 1997.
11	Aug 13 1997		Brief amici curiae of National Association of Criminal Defense Lawyers, et al. filed.
10	Aug 14 1997		Brief of petitioner Kevin D. Gray filed.
13	Aug 29 1997		Order extending time to file brief of respondent on the merits until September 30, 1997.
14	Sep 30 1997		Brief of respondent Maryland filed.
15	Sep 30 1997		Brief amicus curiae of United States filed.
16	Sep 30 1997		Brief amici curiae of New York, et al. filed.
17	Sep 30 1997		Brief amicus curiae of Criminal Justice Legal Foundation filed.
18	Oct 14 1997	G	Motion of the Acting Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
19	Oct 20 1997		Motion of the Acting Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
20	Oct 24 1997		CIRCULATED.
21	Oct 28 1997	G	Application (A97-315) to extend the time to file a reply brief from October 31, 1997 to November 7, 1997 by petitioner, submitted to The Chief Justice.
22	Oct 29 1997		Application (A97-315) granted by the Chief Justice extending the time to file until November 7, 1997.
23	Nov 7 1997	X	Reply brief of petitioner Kevin D. Gray filed.
24	Nov 13 1997		Record filed.
		*	Record proceedings Court of Appeals of Maryland (1 box).
25	Dec 8 1997		ARGUED.

96-8653 (2)

NO. ___

Supreme Court, U.S.
FILED
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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

KEVIN D. GRAY,

Petitioner

v.

STATE OF MARYLAND,

Respondent

ORIGINAL

PETITION FOR WRIT OF CERTIORARI

STEPHEN E. HARRIS
Public Defender

George E. Burns*
Arthur A. DeLano, Jr.
Assistant Public Defenders

Office of the Public Defender
Appellate Division
William Donald Schaefer Tower
6 St. Paul Street, Suite 1302
Baltimore, Maryland 21202
(410) 767-8521

Counsel for Petitioner
*Counsel of Record

54 pp (9)

QUESTION PRESENTED

DID THE INTRODUCTION OF A REDACTED STATEMENT OF A NONTESTIFYING CODEFENDANT DEPRIVED PETITIONER OF HIS SIXTH AMENDMENT RIGHT OF CONFRONTATION ?

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NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

KEVIN D . GRAY,

Petitioner

v.

STATE OF MARYLAND,

Respondent

PETITION FOR WRIT OF CERTIORARI

Kevin D. Gray, Petitioner, by his attorneys, George E. Burns and Arthur A.DeLano, Jr., Assistant Public Defenders, Office of the Public Defender for the State of Maryland, requests that a writ of certiorari be issued to review the judgment of the Court of Appeals of Maryland entered on January 15, 1997 in State of Maryland v. Kevin D. Gray, No. 15, September Term, 1996.

OPINION BELOW

The opinion of the Court of Appeals of Maryland, which is reported and published, is reproduced at page one of the Appendix to this Petition. The opinion of the Court of Special Appeals of Maryland, which is reported and published, is reproduced at page twenty-four of the Appendix to this Petition.

JURISDICTION

The Court of Appeals of Maryland affirmed the judgment of the Circuit Court for Baltimore City, convicting Petitioner of involuntary manslaughter. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257(3).

STATEMENT OF THE CASE

Petitioner was convicted in the Circuit Court for Baltimore City of involuntary manslaughter and was sentenced to ten years imprisonment with all but seven years suspended. His conviction and sentence were reversed by the Court of Special Appeals of Maryland on December 4, 1995. Gray v. Maryland, 107 Md. App. 311, 667 A.2d 983 (1995). On April 17, 1996, the Court of Appeals of Maryland granted a petition for a writ of certiorari. On January 15, 1997, the Court of Appeals of Maryland reversed the judgment of the Court of Special Appeals of Maryland and affirmed the judgment of the Circuit Court for Baltimore City. Maryland v. Gray , 344 Md. 417, 687 A.d 660 (1997).

Petitioner and Anthony Bell were originally charged with murder. The State contended that StaceyWilliams died as a result of a beating by Petitioner, Anthony Bell, Jacquin Vanlandingham (hereinafter Tank), and several other boys.[1] Bell gave

---

[1] The jury was told that Tank was fatally shot two days after this incident.

a written statement to the police in which he incriminated himself, Petitioner, and Tank. Petitioner gave an exculpatory oral statement to the police.[2]

Prior to trial, Petitioner moved to sever his case from Bell's on the grounds that Bell's statement incriminated him. The trial judge denied the motion to sever on the grounds that Bell's statement could "be sanitized in about three different spots so as to remove the names of Tank and Mr. Gray and the jury will not be left with the unavoidable inference or implication that the person Mr. Bell is referring to in the st ment is Mr. Gray." At trial, Bell's redacted statement was introduced into evidence[3]:

> Question, what can you tell me about the beating of Stacey Williams that occurred on 10, November, 1993?
>
> Answer, an argument broke out between deletion and Stacey in the 500 block of Louden Avenue. Stacey got smacked and then ran into Wildwood Parkway. Me, deleted, and a few other guys ran after Stacey. We caught up to him on Wildwood Parkway. We beat Stacey up. After we beat Stacey up, we walked him back to Louden Avenue. I then walked over and used the phone, Stacey and the others walked down Louden.
>
> Question, when Stacey was beaten on Wildwood Parkway, how was he beaten?
>
> Answer, hit, kicked.
>
> Question, who hit and kicked Stacey?
>
> Answer, I hit Stacey. He was kicked, but I don't know who kicked him.
>
> Question, who was in the group that beat Stacey?
>
> Answer, me, deleted, deleted, and a few other guys.
>
> Question, do you know the other guy's name?
>
> Answer, deleted, deleted, and me. I don't remember who was out there.
>
> Question, did anyone pick Stacey up and drop him to the ground?
>
> Answer, no, when I was there.
>
> Question, what was the argument over between Stacey and deleted?
>
> Answer, some money that Stacey owed deleted.
>
> Question, how many guys were hitting on Stacey?
>
> Answer, about six guys.
>
> Question, do you have a black jacket with Park Heights written on the back?
>
> Answer, yes.
>
> Question, who else has these jackets?
>
> Answer, deletion.
>
> Question, after reading this statement, would you sign it?
>
> Answer, yes. He then signed it.

---

[2] In his statement, Petitioner denied beating Williams. Petitioner told the police that he was on the phone nearby when Williams was beaten.

[3] The trial judge granted Petitioner a continuing objection to Bell's statement. Before Bell's statement was introduced into evidence, the trial judge instructed the jury as follows:

> THE COURT: Thank you, Mr. Amaral. Ladies and gentlemen of the jury, you're about to hear evidence concerning the statement provided by Mr. Bell when he was interviewed by the detective. You should understand, and I will remind you later, that this evidence concerning the statement provided by Mr. Bell is to be considered by you as evidence against Mr. Bell only and in no way is Mr. Bell's statement provided to the detective about which he's about to testify to be considered by you as evidence against Mr. Gray. It is evidence against Mr. Bell only, and as I will instruct you later, you will consider the evidence against each of the defendants individually and reach a separate verdict as to each defendant. You may proceed, Ms. Saxon.

Two additional witnesses testified at trial. The first testified that she saw Stacey Williams being chased down the street by Tank, Petitioner, and several other guys. Williams looked scared. The witness did not see who assaulted Williams. The second witness testified that he saw Williams being beaten. The witness was sitting on his steps across the street when Tank, Bell, Petitioner and three other guys confronted Williams. Tank banged Williams in the mouth. Tank kicked Williams several times. Tank then picked Williams up and "DDT'd him" three times.[4] According to this witness, Petitioner tried to, but couldn't, pick Williams up over his head. The witness described Bell as the leader of the group.

Petitioner testified that he did not participate in the beating of Williams. Petitioner maintained that he was talking on the phone with his girlfriend at the time of the beating. Petitioner called several other witnesses to support his claim that he was not involved in the beating.

In reversing Petitioner's conviction, the Court of Special Appeals found that under the circumstances of this case "the introduction of a nontestifying codefendant's inculpatory statement, which is redacted to exclude the names of all those involved in the crime by using the words "deleted" and "deletion", and the

[4] DDT is apparently a World Wrestling Federation term for picking someone up off the ground and then dropping them head first to the mat.(Tc.120-Tc.122, Tc.189)

reading of that statement before a jury, violates a defendant's rights under the Confrontation Clause of the Sixth Amendment, even if the jury is instucted to consider the statement only against the codefendant-confessor." (App. 27) The Court of Special Appeals reasoned that, in the context of the other evidence at trial, the mere deletion of Petitioner's and Tank's names did not effectively make Bell's statement nonincriminating as to Petitioner. (App. 41) There existed, in other words, a "substantial risk" that the jury considered Bell's statement in deciding Petitioner's guilt. (App. 41)

In affirming Petitioner's conviction, the Court of Appeals held that the introduction of a nontestifying codefendant's inculpatory statement, which is redacted to exclude the names of all those involved in the crime by using the words "deleted" and "deletion", and the reading of that statement before a jury, does not violate a defendant's rights under the Confrontation Clause of the Sixth Amendment, if the jury is instructed to consider the statement only against the codefendant-confessor and the statement does not "compel" a directly inculpating inference between the redacted confession and the nonconfessing codefendant. (App. 19) The Court of Appeals then went on to explain that "the compulsion to make the impermissible inference must be compelling, inevitable, and subject to little or no debate." (App. 16)

REASONS FOR ISSUING THE WRIT

THE INTRODUCTION OF A REDACTED STATEMENT OF A NONTESTIFYING CODEFENDANT DEPRIVED PETITIONER OF HIS CONSTITUTIONAL RIGHT OF CONFRONTATION UNDER THE SIXTH AMENDMENT

This case presents for resolution the question left unanswered in Richardson v. Marsh, 481 U.S. 200, 211 n.5, 107 S.Ct. 1702, 95 L.Ed.2d 176 (1987): whether the introduction of a nontestifying codefendant's inculpatory statement, which is redacted to exclude the names of all those involved in the crime by using " a symbol or neutral pronoun", violates a defendant's rights under the Confrontation Clause of the Sixth Amendment, even if the jury is instructed to consider the statement only against the codefendant-confessor.[5] As the Court of Appeals of Maryland

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[5]In Bruton v. United States, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968), this Court held that a defendant is deprived of his Sixth Amendment right of confrontation when an incriminating confession of a nontestifying codefendant which names the defendant as an accomplice is introduced at their joint trial. The Court went on to hold that, given the "substantial risk" that the jury would consider a nontestifying co-defendant's incriminating confession against the defendant, a new trial is required even where the court specifically instructs the jury that the codefendant's confession must be considered as evidence only against the codefendant. Id. at 391 U.S. 126-137. In Richardson, this Court held that "the Confrontation Clause is not violated by the admission of a nontestifying defendant's confession with a proper limiting instruction when, as here, the confession is redacted to eliminate not only the defendant's name, but any reference to his or her existence." 481 U.S. at 211. (emphasis added)

observed below, "there exists a substantial split of authority on the proper approach to the question expressly left open in Marsh." (App. 12)

A number of jurisdictions have adopted the "facial implication" doctrine for assessing whether or not a nontestifying codefendant's redacted confession may be introduced at a joint trial. Under this doctrine, the redacted confession must "be viewed in isolation from the other evidence introduced at trial." United States v. Williams, 936 F.2d 698, 700 (2d Cir. 1991) If "the confession, when so viewed, does not incriminate the defendant, then it may be admitted with a proper limiting instruction, even though the other evidence in the case indicates that the neutral pronoun is in fact a reference to the defendant." Id. See, e.g., United States v. Hoac, 990 F.2d 1099, 1105 (9th Cir. 1993); United States v. Strickland, 935 F.2d 822, 825-26 (7th Cir. 1991); United States v. Donohue, 948 F.2d 438, 444 (8th Cir. 1991); United States v. Vogt, 910 F.2d 1184, 1192 (4th Cir. 1990); United States v. Espinoza-Seanez, 862 F.2d 526, 535 (5th Cir. 1988); United States v. Gonzales, 749 F.2d 1329, 1334 (9th Cir. 1984); United States v. Belle, 593 F.2d 487, 493 (3d Cir. 1979); Hodges v. Rose, 570 F.2d 643, 646-47 (6th Cir. 1978); United States v. Dady, 536 F.2d 675, 677-78 (6th Cir. 1976); Harris v. State, 218 Ga. App. 472, 473, 462 S.E.2d 425, 427 (1995); State v. Craney, 662 A.2d 899, 903 (Me. 1995); Commonwealth v. Sanford, 323 Pa. Super 436, 439-40, 470 A.2d 998, 999-1000 (1984).

Other jurisdictions have adopted an "evidentiary linkage" approach for assessing whether or not a nontestifying codefendant's redacted confession may be introduced at a joint trial. Under the "evidentiary linkage" approach, a nontestifying codefendant's redacted confession may not be admitted at a joint trial where, in the context of the other evidence admitted at trial, there is a "substantial risk" that the jury will consider the codefendant's redacted statement in deciding the guilt of the defendant. See, e.g., United States v. Van Hemelryck, 945 F.2d 1493, 1502-03 (11th Cir. 1991); United States v. Pendegraph, 791 F.2d 1462, 1465-66 (11th Cir. 1986); People v. Fletcher, 13 Cal. 4th 451, 456, 917 P.2d 187, 189 (1996); Smith v. United States, 561 A.2d 468, 474 (D.C. 1989); People v. Cruz, 121 Ill.2d 321, 330-31, 521 N.E.2d 18, 22-23 (1988); People v. Kahn, 200 A.D. 129, 136-37, 613 N.Y.S.2d 198, 203-04 (1994); State v. Johnson, 71 N.C. App. 90, 92, 321 S.E.2d 510, 513 (1984).

Petitioner submits that a nontestifying codefendant's redacted confession must be viewed in context. A redacted confession of a nontestifying codefendant cannot be viewed in isolation. A redacted confession of a nontestifying codefendant should not be admitted at a joint trial where, in the context of the other evidence admitted at trial, there is a "substantial risk" that the jury will consider the codefendant's redacted statement in deciding the guilt of the defendant.[6] As the D.C.

[6] The "compelling inference" standard adopted by the majority of the Court of Appeals of Maryland is not in accord "with the rationale of Bruton as explained and limited by Marsh." The Court of Appeals' reliance on the effectiveness of

Court of Appeals explained in Smith v. United States, 561 A.2d 468, 473-74 (D.C. App. 1989):

> In Foster v. United States, 548 A.2d 1370 (D.C. 1988), this court considered the question the Supreme Court explicitly left open in Richardson v. Marsh, 481 U.S. 200, 107 S.Ct. 1702, 95 L.Ed.2d 176 (1987): the constitutionality under the sixth amendment of admitting at a joint trial, with a proper limiting instruction, a confession of a nontestifying codefendant "in which the defendant's name has been replaced with a symbol or neutral pronoun," id. at 211 n.5, 107 S.Ct. at 1709 n.5. We held that "a properly and effectively redacted statement substituting neutral references for names (including nicknames and the like) and/or descriptions ... may be admitted into evidence at a joint trial (when coupled with proper limiting instructions) unless a `substantial risk' exists that the jury will consider that statement in deciding the guilt of the defendant." Foster, 548 A.2d at 1378. In order to determine whether a substantial risk exists, "the trial court must consider the degree of inference the jury must make to connect the defendant to the statement and the degree of risk that the jury will make the linkage despite a limiting instruction." Id. at 1379. The trial court's assessment as to whether the redaction effectively avoids linkage with the defendant must be made in the context of other evidence admitted at trial. Id.
>
> * * *
>
> ... In the present case, we conclude that the trial court's admission of Harris' written confession with whited-out blank spaces in lieu of Smith's name violated Smith's sixth amendment rights. The fourteen black rectangular squares scattered throughout Harris' two-page confession clearly showed that another person was present and actively assisting Harris. We believe that this confession, viewed in light of the other testimony adduced at trial, see Foster, 548 A.2d at

limiting instructions is clearly misplaced. Where, as here, the Court of Appeals of Maryland expressly found the jury "could have reasonably inferred that one of the deleted names belonged to [Petitioner]", then a limiting instruction is insufficient under Bruton.

> 1379, virtually invited the jury to use Smith's name to "fill in the blanks." Accordingly, we conclude there was a "substantial risk" that the jury relied on this confession in deciding Smith's guilt as well.

On this record, the jury could not help but infer that the deletions in Bell's redacted statement were Petitioner and Tank.Only three of William's assailants were ever identified at trial---Bell, Petitioner, and Tank. As the Court of Special Appeals of Maryland observed below:

> Mere deletion of appellant's (and Tank's) name did not effectively make Bell's statement nonincriminating as to appellant. In the context of other evidence (Brumfield's and Yarberough's testimony), the jury need only have taken a short step in inferring that appellant was one of those involved. Stated otherwise, it did not have to make a substantial inference that appellant was the person neutrally referenced in the redacted statement. Therefore, there existed a "substantial risk" that the jury considered the statement in deciding appellant's guilt. Indeed, with Tank dead, the jury was "virtually invited ... to use [appellant]'s name to 'fill in the blanks.' " Id. Simply stated, the use of "deleted" or "deletion" was insufficient to protect appellant against "the practical and human limitations of the jury system." Bruton, 391 U.S. at 135, 88 S.Ct. at 1627. See also Greenwell v. United States, 336 F.2d 962, 969 (D.C.Cir.1964) (replacing name of defendant with neutral term such as "named person" insufficient redaction since "with other evidence ... connecting the co-defendants in the commission of the crime, it is difficult to believe that the jury was unable to divine who the 'anonymous nobody' referred to in the confession was"). Although, as the State argues, there were six perpetrators, any one of which the jury could infer was referred to by the deletions, only three were positively identified--Bell, appellant, and Tank. Appellant's role was clearly demonstrated by Bell's statement, rendering it facially incriminating and constitutionally violative. "To hold that there was not a substantial risk that the[jury] would consider th[e] evidence ... in considering [a codefendant]'s guilt (limiting instruction or not) would require us to wink at the reality of human behavior of jurors as recognized by the Court in both Bruton and Richardson v. Marsh." Foster v. United States, 548 A.2d 1370, 1379 (D.C.App.1988).

Thus, the instant case represents a point on the continuum between Bruton and Richardson "where one cannot have the requisite degree of assurance that the jury will not improperly *328 consider the evidence in deciding the guilt of the defendant against whom the evidence is not admissible despite a proper limiting instruction." Foster, 548 A.2d at 1378. We add further that we distinguish Richardson v. Marsh by the manner of redaction employed. In Richardson, Marsh's role in the perpetration of the crime had been totally eliminated. There was no indication that anyone other than Williams and [667 A.2d 991] Martin committed the crime. In the instant case, however, appellant's role was disclosed, albeit with reference to a neutral person. Bell was not portrayed as solely having assaulted Williams and the jury could reasonably infer that it was appellant whose name had been "deleted." (E. 20)

The admission of Bell's statement violated the clear dictates of Bruton v. United States, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968). There was "a substantial risk" that the jury, despite the court's instructions to the contrary would look to Bell's redacted statement in determining Petitioner's guilt. Petitioner should either have been granted a severance or if tried jointly then Bell's statement should have been excluded.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that a writ of certiorari issue to review the judgment of the Court of Appeals of Maryland.

Respectfully submitted,

Stephen E. Harris
Public Defender
George E. Burns*
Arthur A. DeLano, Jr.
Assistant Public Defenders
Counsel for Petitioner

*Counsel of Record

APPENDIX

IN THE COURT OF APPEALS OF MARYLAND

No. 15

September Term, 1996

STATE OF MARYLAND

v.

KEVIN D. GRAY

Bell, C.J.
Eldridge
Rodowsky
Chasanow
Karwacki
Raker
Murphy, Robert C.
(retired, specially assigned)

JJ.

Opinion by Karwacki, J.
Bell, C.J. & Eldridge, J., dissent

Filed: January 15, 1997

The issue presented in this case is whether the introduction of a nontestifying codefendant's confession implicating a defendant and others, which is redacted to exclude the names of all those involved in the crime, other than the confessor, by using the words "deleted" and "deletion," violates a defendant's rights under the Confrontation Clause of the Sixth Amendment to the United States Constitution, even if the jury is instructed to consider the confession only against the codefendant-confessor? We shall hold that under the circumstances in this case it does not and reverse the judgment of the Court of Special Appeals.

I.

Stacey Williams was beaten on November 10, 1993, by a group of six young men. Within a few hours, Williams died from his injuries. Following a preliminary investigation, the police arrested Anthony Bell. In a written statement to police, Bell implicated himself, Jacquin Vanlandingham, and Kevin Domonic Gray, the Petitioner, as participants in the beating. Vanlandingham was fatally shot two days after

Williams' death,[7] and Gray was arrested one day later. These three individuals were the only ones identified by name in Bell's statement to police as those involved in the murder, although evidence adduced at trial suggested that as many as six persons participated in the attack on Williams.

Bell and Gray were scheduled to be tried jointly in the Circuit Court for Baltimore City. Prior to trial, however, Gray moved to sever his trial from Bell's, or alternatively to exclude his confession from evidence. The trial court denied both motions but ordered the redaction of Gray and Vanlandingham's names from Bell's confession.

At trial, the State presented the testimony of Tracy Brumfield, Shay Yarberough, and Baltimore City Homicide Detective Homer Pennington. Brumfield testified that she saw Gray, Vanlandingham, and several others chase Williams down the street. Yarberough, the only witness to Williams' beating, testified that he saw Vanlandingham lift Williams over his head and drop him on the sidewalk. Yarberough also testified that Gray attempted the same maneuver, albeit less successfully, and, along with the other five members of the group, including Bell, repeatedly kicked Williams about the ribs, neck, and head.

Detective Pennington testified that his investigation led him to arrest and interview Bell. In the course of that

[7] We do not mean, nor is there any evidence in the record, to suggest that Vanlandingham and Williams' murders are related.

interview, Bell formally confessed to participating in the beating of Williams, implicating both Gray and Vanlandingham in the process.

The State was permitted to read Bell's confession into evidence over his objection, but, as indicated, *supra*, was concomitantly required to redact the names of Gray and Vanlandingham, and insert in their place, the words "deletion" or "deleted." A copy of the redacted confession was admitted into evidence with blank white spaces indicating where the names of Gray and Vanlandingham had been.

Unlike Bell, Gray testified in his own defense, claiming that he was speaking with his girlfriend on a public telephone when the fray ensued. Chanel Brown, Gray's girlfriend, testified that he had called her from a telephone booth and, during that conversation, said that Vanlandingham was fighting. Defense witness Lamont Mathews testified that although he had witnessed Williams' beating, he placed Gray at a telephone booth "up the street" during the melee. The jury nonetheless convicted Gray of involuntary manslaughter, for which he was sentenced to ten years imprisonment with all but seven years suspended.

Gray appealed that judgment to the Court of Special Appeals, claiming that the introduction of Bell's redacted confession violated his Sixth Amendment right to confrontation, and was contrary to the holding in *Bruton v. United States*, 391 U.S. 123, 88 S. Ct. 1620, 20 L. Ed. 2d 476

(1968). The intermediate appellate court agreed and reversed Gray's conviction. *Gray v. State*, 107 Md. App. 311, 667 A.2d 983 (1995). We granted the State's Petition for a Writ of Certiorari.

II.

In the trial of every criminal case, state or federal, a defendant has the right "to be confronted with witnesses against him." U.S. Const. amend. VI; *Pointer v. Texas*, 380 U.S. 400, 403, 85 S. Ct. 1065, 1068, 13 L. Ed. 2d 923, 926 (1965)(Sixth Amendment made applicable to states through Fourteenth Amendment); *Smallwood v. State*, 320 Md. 300, 306, 577 A.2d 356, 359 (1990); *Harris v. State*, 306 Md. 344, 361, 509 A.2d 10, 128 (1986). Implicit in this principle is the right to cross-examine those witnesses. *Pointer*, 380 U.S. at 406-07, 88 S. Ct. at 1069-70, 13 L. Ed. 2d at 928; *Smallwood*, 320 Md. at 306, 577 A.2d at 359.

In *Bruton v. United States, supra*, the United States Supreme Court held that the admission of a nontestifying codefendant's pretrial confession implicating another codefendant by name, violated that defendant's Sixth Amendment confrontation right, notwithstanding an instruction to the jury to disregard the confession in determining the nonconfessing defendant's guilt.[8] Bruton was tried and

[8] The *"Bruton* Rule" was extended to state court proceedings in *Roberts v. Russell*, 392 U.S. 293, 88 S. Ct. 1921, 20 L. Ed.2d 1100 (1968).

convicted along with one Evans, who, during the preceding investigation, orally confessed to a postal inspector that he and Bruton perpetrated an armed postal robbery. The postal inspector subsequently testified to Evans' confession. The trial judge duly instructed the jury that the confession was competent evidence against Evans only and was not to be used in assessing Bruton's innocence or guilt.[9] The Supreme Court nevertheless reversed Bruton's conviction.

In so doing, the Court repudiated its previous position that "'it is reasonably possible for the jury to follow' sufficiently clear instructions to disregard the confessor's extrajudicial statement that his codefendant participated with him committing the crime." *Bruton*, 391 U.S. at 126, 88 S. Ct. at 1622, 20 L. Ed. 2d at 479 (quoting *Delli Paoli v. United States*, 352 U.S. 232, 239, 77 S. Ct. 294, 299, 1 L. Ed. 2d 278, 284 (1957)). The reason for the departure, articulated initially by the *Delli Paoli* dissent, was that:

> "too often such admonition against misuse [of a codefendant's confession] is intrinsically ineffective in that the effect of such a nonadmissible declaration cannot be wiped from the brains of the jurors. The admonition therefore becomes a futile collection of words and fails of its purpose as a legal protection to defendants . . . . The Government should

[9] The relevant portion of the judge's instruction advised the jurors that:

> "A confession made outside of court by one defendant may not be considered as evidence against the other defendant, who was not present and in no way a party to the confession. Therefore, if you find that a confession was in fact voluntary and intentionally made by the defendant Evans, you should consider it as evidence in the case against Evans, but you must not consider it, and should disregard it, in considering the evidence in the case against the defendant Bruton.

> not have the windfall of the jury being influenced by evidence against a defendant which, as a matter of law, they should not consider but which they cannot put out of their minds.

352 U.S. at 247-48, 77 S. Ct. at 302, 1 L. Ed. 2d at 288 (Frankfurter, J., dissenting).

The Court acknowledged three arguments supporting the use of limiting instructions in this area, namely the probative value of the confession, judicial economy, and the integrity of the jury system itself, but categorically rejected the first two. While the confession may be the best evidence of the confessor's guilt, alternative ways exist to allow the State the benefit of the confession without infringing upon the nonconfessing defendant's constitutional rights. *Bruton*, 391 U.S. at 133-34, 88 S. Ct. at 1626, 20 L. Ed. 2d at 483-84. The use of redactions is but one example. *Id.* at 134 n.10, 88 S. Ct. at 1627 n.10, 20 L. Ed. 2d at 484 n.10.

Similarly, joint trials conserve state resources by avoiding the necessity of duplicate proceedings, reduce inconveniences to witnesses, and accelerate the judicial process. *Id.* at 134, 88 S. Ct. at 1627, 20 L. Ed. 2d at 484. Nevertheless, fundamental constitutional rights, such as the right of confrontation, are seldom sacrificed upon the altar of judicial efficiency. *Id.* at 135, 88 S. Ct. at 1627, 20 L. Ed. 2d at 484.

Turning to the third argument in support of limiting instructions, the Court acknowledged that inadmissible evidence inevitably finds its way before the jury, but that reliance on the

jury's ability to perform its role is justified under many circumstances. *Id.*, 88 S. Ct. at 1627, 20 L. Ed. 2d at 484. In those instances, "[i]t is not unreasonable to conclude . . . [that] the jury can and will follow the trial judge's instructions to disregard such information. *Id.*, 88 S. Ct. at 1627, 20 L. Ed. 2d at 484-85. When, however,

> "the powerfully incriminating extrajudicial statements of a codefendant who stands side-by-side with the defendant, are deliberately spread before the jury in a joint trial . . . the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure [are] so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored."

Id. at 135-36, 88 S. Ct. at 1627, 20 L. Ed. 2d at 485. The Court concluded that:

> "despite the concededly clear instructions to the jury to disregard Evans' inadmissible hearsay evidence inculpating [Bruton], in the context of a joint trial, we cannot accept limiting instructions as an adequate substitute for [Bruton's] constitutional right of cross examination . . . . The effect is the same as if there had been no instruction at all."

Id. at 137, 88 S. Ct. at 1628, 20 L. Ed. 2d at 485-86.

III.

Nineteen years later in *Richardson v. Marsh*, 481 U.S. 200, 107 S. Ct. 1702, 95 L. Ed. 2d 176 (1987), the practice of omitting any references to a defendant from a statement being introduced against a confessing codefendant was challenged ▓ a practice initially suggested by the Court itself. *See*, Part II., *supra*. Clariss

Marsh, Benjamin Williams and Kareem Martin were charged with assaulting Cynthia Knighton and murdering her son, Koran, and her aunt, Ollie Scott. Over Marsh's objection, Marsh and Williams were tried together.[10] At trial, the state introduced a confession made by Williams shortly after his arrest. The confession had been redacted to omit all references to Marsh. In fact, on its face, the confession implicated no one other than Williams and Martin in the crimes. Williams did not testify. Nevertheless, Marsh was linked to the confession via her own testimony that she was in the vehicle on the way to the crime scene when, by Williams' admission, he and Martin discussed their plans to rob and kill the victims, although Marsh claims not to have heard the conversation. Marsh also testified to being in the house during the robbery, but could not explain why she did not attempt to flee or otherwise assist the victims.

During his closing remarks, the prosecutor cautioned the jury not to use Williams' confession as evidence against Marsh. Nevertheless, he linked Marsh to the confession by suggesting that if Marsh was in the car during Martin and Williams' conversation, she was, by implication, part of the criminal enterprise. Marsh was convicted of two counts of felony murder and one count of assault with intent to commit murder.

Marsh successfully appealed her conviction to the United States Court of Appeals for the Sixth Circuit. 781 F.2d 1201 (1986). In reversing her conviction, that court opined:

[10] Kareem Martin was a fugitive at the time of trial.

> "Sanctioning the admission of an extrajudicial statement in circumstances in which a substantial risk exists that the statement will be used against the defendant not only denies the Sixth Amendment Right to Confrontation, but raises serious due process concerns regarding the validity of the conviction and the fundamental fairness of the trial process. It is no answer to this unfairness to say that the evidence that set the stage was subject to cross-examination. . . . [T]he determination of whether there exists a substantial risk that the jury might have [improperly] considered [the confession] `may require consideration of other evidence.'"

781 F.2d at 1212 (citations omitted). Assuming the existence of such a risk, the Sixth Circuit noted that the only direct evidence[11] suggesting Marsh knew beforehand that the victims would be robbed and executed was Williams' account of his conversation with Martin just prior to the crime. *Id.* at 1210. In view of the lack of other evidence connecting Marsh to the activities of Williams and Martin, the prosecutor's linkage of Marsh to the confession proved "powerfully incriminating" to her with respect to the critical element of intent, *id.* at 1213, thereby violating her Sixth Amendment confrontation right. Noting that other courts of appeals have declined to adopt the "evidentiary linkage" or "contextual implication" approach to the *Bruton* problem, the United States Supreme Court granted certiorari to resolve the conflict. 476 U.S. 1168, 106 S. Ct. 2887, 90 L. Ed. 2d 976 (1986).

The Supreme Court in *Marsh* rejected the Sixth Circuit's

[11] We note that under Maryland law, there is no difference, in terms of evidentiary value, between direct evidence and circumstantial evidence. *See, e.g., Magnum v. State*, 342 Md. 392, 398, 676 A.2d 80, 82 (1995).

analysis and characterized the holding in *Bruton* as "a narrow exception" to the general principle that jurors follow instructions given them.[12] *Marsh*, 481 U.S. at 206-07, 107 S. Ct. at 1707, 95 L. Ed. 2d at 185. The Court premised its holding upon three basic assumptions. First, "where the necessity of . . . linkage [to other evidence] is involved, it is a less valid generalization that the jury will not likely obey the instruction to disregard the evidence." 481 U.S. at 208, 107 S. Ct. at 1708, 95 L. Ed. 2d at 186. Unlike specific testimony directly inculpating the defendant, as was the case in *Bruton*, inferential incrimination can be avoided by dissuading the jury from making the inference in the first instance. *Id.*, 107 S. Ct. at 1708, 95 L. Ed. 2d at 186.

Second, the practical effect of the "linkage" or "contextual approach" to the *Bruton* question would place an impossible burden upon trial courts. If limited to *facially* incriminating confessions, *Bruton* compliance could be had by simple redaction. *Id.* at 208-09, 107 S. Ct. at 1708, 95 L. Ed. 2d at 186 (citing

[12] In support of this principle, the Court cited *Francis v. Franklin*, 471 U.S. 307, 324-25 n.9, 105 S. Ct. 1965, 1976 n.9, 85 L. Ed. 2d 344, 359-60 n.9 (1985)(Court presumes that jurors, conscious of the gravity of their task, attend closely the particular language of the trial court's instructions in a criminal case and strive to understand, make sense of, and follow the instructions given them), *Harris v. New York*, 401 U.S. 222, 225-26, 91 S. Ct. 643, 645-46, 28 L. Ed. 2d 1,4-5 (1971)(provided jury is properly instructed, statements obtained in violation of *Miranda* can be used to impeach defendant's credibility, even though inadmissible to prove defendant's guilt), *Marshall v. Longberger*, 459 U.S. 422, 438-39 n.6, 103 S. Ct. 843, 853 n.6, 74 L. Ed. 2d 646, 661-62 n.6 (1983)(crucial assumption underlying the system of trial by jury is that jurors will follow the instructions given them by the trial judge), *Tennessee v. Street*, 471 U.S. 409, 415, 105 S. Ct. 2078, 2082, 85 L. Ed. 2d 425, 431 (1985)(codefendant's confession properly admitted to prove defendant's confession was not coerced), *Watkins v. Sowders*, 449 U.S. 341, 347, 101 S. Ct. 654, 658, 66 L. Ed. 2d 549, 555 (1981)(instruction admonishing jury not to consider improperly admitted eyewitness testimony sufficient to cure error), *Walder v. United States*, 347 U.S. 62, 65-66, 74 S. Ct. 354, 356, 98 L. Ed. 503, 507 (1954)(illegally obtained evidence properly admitted to impeach defendant with appropriate limiting instruction). *Richardson v. Marsh*, 481 U.S. 200, 206-07, 107 S. Ct. 1702, 1707, 95 L. Ed. 2d 176, 185 (1987).

Bruton, 391 U.S. at 134 n.10, 88 S. Ct. at 1627 n.10, 20 L. Ed. 2d at 484 n.10). Conversely, an analysis requiring linkage requires both a pretrial and post-trial determination of whether, after viewing all the evidence introduced, the confession is so "powerfully incriminating" that it should either be excluded in the first instance or the defendant granted a new trial. *Id.* at 209, 107 S. Ct. at 1708, 95 L. Ed. 2d at 187. Such a result not only invites defense malfeasance, but consumes large quantities of time and guarantees nothing in the way of certainty. *Id.*, 107 S. Ct. at 1708, 95 L. Ed. 2d at 187.

Finally, although it might be suggested that the simple remedy to the *Bruton* problem is to forego joint trials when the confession of one defendant might conceivably incriminate the other, the efficacy of that remedy is questionable. *Id.*, 107 S. Ct. at 1708, 95 L. Ed. 2d at 187. Not only do joint trials serve an important function in our criminal justice system in terms of efficiency, they protect defendants from the unfair advantage that a later-tried defendant has over his earlier-tried counterpart, and avoid the criticism associated with inconsistent verdicts.[13] *Id.*, 107 S. Ct. at 1708-09, 95 L. Ed. 2d at 187.

In the end, the Court declined to extend *Bruton's* reach, concluding that "the calculus changes when confessions that do not name the defendant are at issue." *Id.* at 211, 107 S. Ct. at 1709,

[13] The Court also acknowledged that *Bruton* could be complied with by not using codefendant confessions at all, but rejected that suggestion, noting that "confessions `are . . . essential to society's compelling interest in finding, convicting, and punishing those who violate the law.'" *Richardson v. Marsh*, 481 U.S. 200, 210, 107 S. Ct. 1702, 1708, 95 L. Ed. 2d 176, 187-88 (1987)(quoting *Moran v. Burbine*, 475 U.S. 412, 426, 106 S. Ct. 1135, 1143, 89 L. Ed. 2d 410, 424 (1986)).

95 L. Ed. 2d at 188. Having said that, however, the Court specifically reserved the issue of "the admissibility of a confession in which the defendant's name has been replaced with a symbol or neutral pronoun." *Id.* at 211 n.5, 107 S. Ct. at 1709 n.5, 95 L.2d Ed. at 188 n.5. This, of course, is the issue presently before us.

IV.

There exits a substantial split of authority on the proper approach to the question expressly left open in *Marsh*. Some courts subscribe to the "contextual" or "evidentiary linkage" approach to the *Bruton* problem. Those jurisdictions principally rely upon the notion that when a nontestifying codefendant's confession tends to inculpate a defendant in light of other evidence presented, or to be presented, at trial, thereby creating a "substantial risk" that the jury will improperly use the confession, the defendant's Sixth Amendment confrontation right is denied. *See, e.g., United States v. Van Hemelryck*, 945 F.2d 1493, 1502-03 (11th Cir. 1991); *United States v. Pendegraph*, 791 F.2d 1462, 1465-66 (11th Cir. 1986); *People v. Fletcher*, 13 Cal. 4th 451, 456, 917 P.2d 187, 189 (1996); *Smith v. United States*, 561 A.2d 468, 474 (D.C. 1989); *People v. Cruz*, 121 Ill.2d 321, 330-31, 521 N.E.2d 18, 22-23 (1988); *People v. Kahn*, 200 A.D. 129, 136-37, 613 N.Y.S.2d 198, 203-04 (1994); *State v. Johnson*, 71 N.C. App. 90, 92, 321 S.E.2d 510, 513 (1984).

Other jurisdictions, however, employ the "facial implication" doctrine, holding that when the complaining defendant's name is

replaced with a neutral pronoun, and the confession does not otherwise, by itself, inculpate that defendant, it is admissible against the confessing codefendant. *See, e.g., United States v. Hoac*, 990 F.2d 1099, 1105 (9th Cir. 1993); *United States v. Williams*, 936 F.2d 698, 700 (2d Cir. 1991); *United States v. Strickland*, 935 F.2d 822, 825-26 (7th Cir. 1991); *United States v. Donohue*, 948 F.2d 438, 444 (8th Cir. 1991); *United States v. Vogt*, 910 F.2d 1184, 1192; (4th Cir. 1990); *United States v. Espinoza-Seanez*, 862 F.2d 526, 535 (5th Cir. 1988); *United States v. Gonzales*, 749 F.2d 1329, 1334 (9th Cir. 1984); *United States v. Belle*, 593 F.2d 487, 493 (3d Cir. 1979); *Hodges v. Rose*, 570 F.2d 643, 646-47 (6th Cir. 1978); *United States v. Dady*, 536 F.2d 675, 677-78 (6th Cir. 1976); *Harris v. State*, 218 Ga. App. 472, 473, 462 S.E.2d 425, 427 (1995); *State v. Craney*, 662 A.2d 899, 903 (Me. 1995); *Commonwealth v. Sanford*, 323 Pa. Super 436, 439-40, 470 A.2d 998, 999-1000 (1984).

At their extremes, neither approach is completely satisfactory. Evidentiary linkage, applied in its most liberal form, completely undermines the long held, and vitally necessary, presumption that juries follow trial court instructions. The approach also has practical administrative difficulties and may harm defendants as much as it may protect them.

Similarly, while the facial implication doctrine has simplistic appeal, redacted confessions with "neutral pronouns may still prove impossible to 'thrust out of mind.'" *People v. Fletcher*, 13 Cal. 4th at 463, 917 P.2d at 195 (quoting *Marsh*, 481

U.S. at 208, 107 S. Ct. at 1707-08, 95 L. Ed. 2d at 186). The possibility certainly exists whereby notwithstanding the substitution of a defendant's name with a neutral pronoun, a jury could reach but one conclusion ▓ that the omission is, in fact, the nonconfessing codefendant.[14] Although one might argue that is so only when linked with other evidence admitted at trial, the inferential step that the jury must take to reach that conclusion may be so small as to be no step at all. In those instances, the act of redaction becomes a mere formalistic exercise devoid of the Constitutional protections undergirding *Bruton*, and the confession's exclusion from evidence is warranted.[15] *See Clark v. Maggio*, 737 F.2d 471, 476 (5th Cir. 1984)(redaction technique must be employed cautiously and carefully to avoid violating the spirit, if not the letter, of *Bruton*).

Despite the State's assertions to the contrary, it does not necessarily follow from *Bruton* or *Marsh* that a confession that does not implicate a nonconfessing codefendant by name, automatically, and without further inquiry, passes Constitutional muster. We reject, in its most pristine form, the facial implication doctrine

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[14] *See, e.g., Harrington v. California*, 395 U.S. 250, 89 S. Ct. 1726, 23 L. Ed. 2d 284 (1969) wherein four defendants, one Caucasian and three African-Americans, where tried together. Harrington, the Caucasian, had made statements placing himself at the scene of the crime. The confession of a nontestifying codefendant was introduced against that codefendant. Although the confession did not implicate Harrington by name, it did refer to "the white guy." Under the circumstances, the Court concluded the inculpatory effect was the same as if it had. *See also United States v. Foree*, 43 F.3d 1572, 1578 n.9 (11th Cir. 1995)(jury compelled by other evidence to conclude that defendant was person named in nontestifying codefendant's confession); *People v. Terry*, 2 Cal. 3d 362, 387-88, 466 P.2d 961, 976-77 (1970).

[15] The other option is to grant a severance and try the nonconfessing defendant separately if the state otherwise chooses to introduce the facially incriminating confession against the confessing defendant.

urged by the State.

We think the better approach is that typified by the holding in *United States v. Pendegraph*, *supra*, where the United States Court of Appeals for the District of Columbia Circuit held that "a redacted confession may still violate the *Bruton* rule if the statement *compels* a directly inculpating inference" between the redacted confession and the nonconfessing codefendant. 791 F.2d at 1465 (emphasis added) (where the word "individual" was substituted for Pendegraph's name in his codefendant's confession, the jury could infer that Pendegraph was that "individual" if only because there was no other possibility); *see also United States v. Washington*, 952 F.2d 1402, 1407 (D.C. Cir. 1991)(with proper limiting instruction, Confrontation Clause not violated by redacted statement that, when viewed with other evidence, does not create an inevitable association with the nonconfessing defendant).

As we see it, this approach accords with the rationale of *Bruton* as explained and limited by *Marsh*. The substantial risk to which *Bruton* speaks comes not from the incriminatory tendency of a nontestifying codefendant's confession as to another defendant, but from the belief that in certain exceptional circumstances, a jury will not be able to resist the temptation to ignore the trial court's instructions to overlook what has been thrust into their line of sight. Indeed, jurors are strongly presumed to follow trial court instructions. *See* n.6, *supra*. When however, the directly (and undeniably) inculpatory statements of a codefendant are given to the jury's consideration, notwithstanding a limiting

instruction to the contrary, the presumption is overcome and a substantial risk therefore exists that the jury will use the confession as evidence against the nonconfessing defendant. *Bruton*, 391 U.S. at 136-37, 107 S. Ct. at 1628, 20 L.Ed.2d at 485. In other words, a *Bruton* violation occurs when jurors are compelled to do, as rational human beings, that which they have been instructed by the trial court they must not link a nonconfessing defendant to a nontestifying codefendant's confession. The compulsion to make the impermissible inference must be compelling, inevitable, and subject to little or no debate. Otherwise, the general and strong presumption that jurors follow their instructions is not overcome, and the requirements of *Bruton* are therefore satisfied. *See Marsh*, 481 U.S. at 211, 107 S. Ct. at 1709, 176 L. Ed. 2d at 188.

To be sure, some courts have predicated their conclusions that a confession creates a "substantial risk" that the jury will not heed trial court instructions and therefore is "powerfully incriminating" to a defendant based upon the relative strength of the state's case. *See, e.g., United States v. Key*, 725 F.2d 1123, 1126 (7th Cir. 1984); *English v. United States*, 620 F.2d 150, 152 (7th Cir. 1980). That analysis, however, concerns whether the denial of a defendant's confrontation rights was harmless, *see, e.g., Chapman v. California*, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 705 (1967), not whether the denial of those rights occurred in the first place. We agree that

> "[t]he decision on how to `*Brutonize*' a statement, if necessary, must ordinarily be

> made early in the trial, when the judge is not in an ideal position to assess the strength of the government's case. A judge can decide at the outset, however, whether a codefendant statement is likely to incriminate other defendants in such a way as to create a substantial *risk* that the jury will consider it in deciding on the guilt of those defendants. If the incriminating references ultimately adds little to the government's case, then their exclusion does no harm, and the confrontation rights of the defendants are preserved. We do not read *Bruton* as guaranteeing a right of confrontation only as against testimony that proves to be vital to the prosecution's case.

Hodges v. Rose, supra, 570 F.2d at 647 n.9. It was in this manner that the trial judge in the case *sub judice* ordered the redaction of Bell's confession, but otherwise allowed the State the benefit of its evidentiary value.

V.

As indicated in Part I., *supra*, the State substituted the words "deletion" or "deleted, for the names of Gray and Vanlandingham. Bell's redacted confession, read to the jury and introduced into evidence, provided in pertinent part:

> "Question, what can you tell me about the beating of Stacey Williams that occurred on 10, November, 1993?
>
> Answer, an argument broke out between *deletion* and Stacey in the 500 block of Louden Avenue. Stacey got smacked and then ran into Wildwood Parkway. Me, *deleted*, and a few other guys ran after Stacey. We caught up to him on Wildwood Parkway. We beat Stacey up. After we beat Stacey up, we walked him back to Louden Avenue. I then walked over and used the phone, Stacey and the others walked down Louden.
>
> Question, when Stacey was beaten on Wildwood Parkway, how was he beaten?

Answer, hit, kicked.

Question, who hit and kicked Stacey?

Answer, I hit Stacey. He was kicked, but I don't know who kicked him.

Question, who was in the group that beat Stacey?

Answer, me, *deleted*, *deleted*, and a few other guys.

Question, did anyone pick Stacey up and drop him to the ground?

Answer, no, when I was there.

Question, what was the argument over between Stacey and *deleted*?

Answer, some money that Stacey owed *deleted*.

Question, how many guys were hitting on Stacey?

Answer, about six guys.

Question, do you have a black jacket with Park Heights written on the back?

Answer, yes.

Question, who else has these jackets?

Answer, *deletion*."

Prior to the confession's introduction into evidence, the court cautioned the jury that

> "the statement provided by Mr. Bell is to be considered by you as evidence against Mr. Bell only and in no way is Mr. Bell's statement provided to the detective about which he's about to testify to be considered as evidence against Mr. Gray. It is evidence against Mr. Bell only, and, as I will instruct you later, you will consider the evidence against the defendants individually and reach a separate verdict as to each defendant."

Taking its cue from the District of Columbia Court of Appeals, the intermediate appellate court relied heavily upon *Smith v. United States*, 561 A.2d 468 (D.C. 1989) wherein blank spaces were used in place of Smith's name in his co-defendant's inculpatory, but otherwise redacted, confession. The Court of Appeals for the District of Columbia opined that:

> "In order to determine whether a substantial risk exists [that the jury will improperly use the confession against the non-confessing codefendant], `the trial court must consider the degree of inference the jury must make to connect the defendant to the statement and the degree of risk that the jury will make that linkage despite a limiting instruction.' The trial court's assessment as to whether the redaction effectively avoids linkage with the defendant must be make in the context of other evidence admitted at trial."

Smith, 561 A.2d at 474 (quoting *Foster v. United States*, 548 A.2d 1370, 1379 (D.C. 1988)). Applying that standard, the Court of Special Appeals noted that "mere deletion of [Gray and Vanlandingham's names]" failed to eliminate from Bell's confession *Bruton* hazards because the jury "did not have to make a substantial inference that [Gray] was [one of] the person[s] neutrally referenced in the redacted statement." *Gray*, 107 Md. App. at 327, 667 A.2d at 990. In other words, in light of other evidence presented at Gray's trial, "the jury could reasonably infer that it was appellant whose name had been `deleted.'" 107 Md. App. at 328, 667 A.2d at 991.

While we agree that the jury *could have* reasonably inferred that one of the deleted names belonged to Gray, that inference was not compelled. As both the trial court and the intermediate

appellate court acknowledged, as many as six individuals participated in the attack on Williams. The Court of Special Appeals, however, pointed out that "only three were positively identified [redacted] Bell, appellant, and [Vanlandingham]" and concluded that "[Gray]'s role was clearly demonstrated by Bell's confession, rendering it facially incriminating[.]" 107 Md. App. at 327, 667 A.2d at 990. We disagree.

As we have said, a *Bruton* violation occurs when a codefendant's confession, either facially, or by compelling and inevitable inference, inculpates a nonconfessing defendant. Under those circumstances, there *is* a substantial risk that the jury will not heed the trial court's instructions to disregard the confession as evidence against the nonconfessing defendant or defendants.

True, Shay Yarberough implicated the same individuals from the witness stand as did Bell's confession, but Yarberough also testified that at least three other individuals were involved in the fray, whom he could not (or would not) identify. Other than by inference, the jury had no way of knowing that Yarberough's testimony and Bell's confession paralleled, and the prosecution did not, in any way, suggest such a coincidence.[16] It was that very inference that the trial court instructed the jury that they must not make.

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[16] Although there is no evidence or allegation of misconduct in this case, the *Marsh* Court alluded to the possibility that prosecutorial attempts to undermine a trial court's limiting instruction by encouraging jurors to make impermissible inferences regarding the relationship between a defendant and a nontestifying codefendant's confession may form the basis of a *Bruton* challenge. 481 U.S. at 211, 107 S. Ct. at 1709, 95 L. Ed. 2d at 188. At least two courts have provided relief upon this basis. *See United States v. Sherlock*, 865 F.2d 1069 (9th Cir. 1989); *People v. Cruz*, 521 N.E.2d 18, cert. denied, 488 U.S. 869, 109 S. Ct. 177, 107 L. Ed. 2d 146 (1988).

As we indicated, *supra*, that the jury could have reasonably connected Gray to Bell's confession is not sufficient to raise a *Bruton* challenge. Although the jury knew at the time of trial Vanlandingham was dead, the omitted references in Bell's confession could have been any one of at least four other individuals ▓ a fact emphasized by the States' Attorney no less than three times during her final summation. The jury was instructed not to use Bell's confession as evidence against Gray, and, in light of the strong presumption that the jury followed those instructions, Gray's Sixth Amendment confrontation right was adequately protected. His unsupported speculation about what the jury might have done if they drew an impermissible inference is simply insufficient to warrant a reversal upon these facts. In short, "there does not exist [in the present case] the overwhelming probability of [the jury's inability to follow trial court instructions] that is the foundation of the *Bruton*[] . . . Rule." *Marsh*, 481 U.S. at 208, 107 S. Ct. at 1707, 95 L. Ed. 2d at 185.

JUDGMENT OF THE COURT OF SPECIAL APPEALS REVERSED; CASE REMANDED TO THAT COURT WITH DIRECTIONS TO AFFIRM THE JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY. COSTS IN THIS COURT AND IN THE COURT OF SPECIAL APPEALS TO BE PAID BY RESPONDENT.

IN THE COURT OF APPEALS OF MARYLAND

No. 15

September Term, 1996

STATE OF MARYLAND

v.

KEVIN D. GRAY

Bell, C.J.,
Eldridge
Rodowsky
Chasanow
Karwacki
Raker
Murphy, Robert C.,
(Retired, specially assigned),
JJ.

Dissenting Opinion by Bell, C.J.,
and Eldridge, J.

Filed: January 15, 1997

Bell, C.J., and Eldridge, J., dissenting:

We would affirm the judgment of the Court of Special Appeals for the reasons set forth in Judge Cathell's excellent opinion for that court. *See Gray v. State*, 107 Md. App. 311, 667 A.2d 983 (1995).

REPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 244

SEPTEMBER TERM, 1995

KEVIN D. GRAY

v.

STATE OF MARYLAND

Fischer,
Cathell,
Hollander,
JJ.

Opinion by Cathell, J.

Filed: December 4, 1995

Appellant, Kevin D. Gray, was convicted by a jury in the Circuit Court for Baltimore City of involuntary manslaughter. The court committed appellant to the custody of the Commissioner of Correction for a period of ten years, with all but seven years suspended. Appellant presents two issues for our review, which we rephrase as follows:

> 1. Did the trial court err in admitting into evidence the redacted statement of appellant's codefendant that implicated appellant in the crime?
>
> 2. Did the trial court abuse its discretion when it substituted an alternate juror for a designated juror during trial?

After a review of the relevant facts and law regarding the first issue, we shall reverse appellant's conviction and remand to the trial court. We do not reach appellant's second issue.

Six young men were involved in the beating death of Stacey Williams on November 10, 1993. Investigation of the incident prompted the authorities to arrest Anthony Bell, who gave a written statement implicating himself, appellant, and Jacquin Vanlandingham (also known as "Tank") in Williams's death.[1] These three individuals were the only ones identified by name as having been involved in the beating.

Appellant and Bell were scheduled to be tried jointly. Prior to trial, appellant moved to sever his case from Bell's, or, in the alternative, to exclude Bell's statement from their joint trial.

[1] Tank was fatally shot two days after the incident.

The court denied appellant's motion to sever and ordered that appellant's and Tank's names be redacted from Bell's statement. Bell declined to testify.

At trial, Tracey Brumfield placed appellant at the scene of the crime. She testified that she saw appellant, Tank, and several others chase Williams down the street. Shay Yarberough actually witnessed the beating. He testified that he saw Tank kick and punch Williams several times and pick Williams up over his head and throw him head first onto the sidewalk three times. He also testified that he saw appellant attempt to pick Williams up over his head and drop him on the sidewalk. Detective Homer Pennington of the Baltimore City Homicide Unit testified that he was assigned to the case and, in the course of his investigation, interviewed Bell. During the interview, Bell gave a written statement implicating himself, appellant, and Tank in Williams's beating. The State was permitted to read the statement into evidence at trial, but, as previously stated, was required to redact the names of appellant and Tank therefrom; the words "deletion" and "deleted" were inserted in place of the redacted names. A copy of the statement was also introduced into evidence and blank white spaces marked the places where the names of appellant and Tank had been redacted. We shall address the actual reading of the statement before the jury, *infra*.

Appellant testified in his defense. He stated that he was talking to his girlfriend on a nearby pay phone at the time of the beating. Several other witnesses were called in appellant's

defense. Renardo Bell testified that he saw Tank pick up Williams and throw him down, but he did not see appellant in the group. Lamont Matthews also testified that appellant was not in the group of people that had gathered around and beat Williams; that appellant was at a phone booth about half a block up the street. Chanel Brown, appellant's girlfriend, stated that appellant had called her from a pay phone and that appellant had said that Tank was up the street fighting. The jury found appellant guilty of involuntary manslaughter. He filed this timely appeal from that conviction.

Appellant seeks resolution of a question left unanswered by the United States Supreme Court in *Bruton v. United States*, 391 U.S. 123, 88 S. Ct. 1620 (1968), and *Richardson v. Marsh*, 481 U.S. 200, 107 S. Ct. 1702 (1987): whether the introduction of a nontestifying codefendant's inculpatory statement, which is redacted to exclude the names of all those involved in the crime by using the words "deleted" and "deletion," and the reading of that statement before a jury, violates a defendant's rights under the Confrontation Clause of the Sixth Amendment, even if the jury is instructed to consider the statement only against the codefendant-confessor. We hold that, under the circumstances of this case, it does and reverse. We explain.

The Confrontation Clause of the Sixth Amendment, made applicable to the States through the Fourteenth Amendment, *Pointer v. Texas*, 380 U.S. 400, 403, 85 S. Ct. 1065, 1068 (1965), guarantees

the right of an accused "to be confronted with the witnesses against him." The right of confrontation includes the right of cross-examination. Thus, "where two defendants are tried jointly, the pretrial confession of one cannot be admitted against the other unless the confessing defendant takes the stand." *Richardson*, 481 U.S. at 206, 107 S. Ct. at 1707.

In *Bruton, supra*, Bruton and Evans were charged with armed robbery. Both were convicted after a joint trial, at which a postal inspector, to whom Evans had confessed his involvement and Bruton's complicity, testified thereto. The trial court duly instructed the jury to disregard the confession in determining Bruton's guilt or innocence and to consider it as competent evidence only against Evans. The Supreme Court began its discussion by noting what had been the Court's premise up to that point: that "it [was] 'reasonably possible for the jury to follow' sufficiently clear instructions to disregard [a] confessor's extrajudicial statement that his codefendant participated with him in committing the crime." 391 U.S at 126, 88 S. Ct. at 1622 (quoting *United States v. Delli Paoli*, 352 U.S. 232, 239, 77 S. Ct. 294, 299 (1957)). The problem with adhering to this principle had earlier been indicated by the dissent in *Delli Paoli*. Justice Frankfurter spoke for the four dissenters:

> [T]oo often such admonition against misuse is intrinsically ineffective in that the effect of such a nonadmissible declaration cannot be wiped from the brains of the jurors . . . and fails of its purpose as a legal protection to defendants against whom such a declaration

> should not tell. . . . The Government should not have the windfall of having the jury be influenced by evidence against a defendant which, as a matter of law, they should not consider but which they cannot put out of their minds.

352 U.S. at 247-48, 77 S. Ct. at 303.

While recognizing the efficacy of joint trials, the *Bruton* Court also acknowledged that the potential for abrogation of a defendant's constitutional right of confrontation was a "hazard" that could not be ignored. 391 U.S. at 137, 88 S. Ct. at 1628 (quoting *Jackson v. Denno*, 378 U.S. 368, 389, 84 S. Ct. 1774, 1787 (1964)). Though the Court suggested the possibility that "viable alternatives" existed to achieve both the benefit of admission of the statement and the protection of a nonconfessor's right of confrontation, it stated that, when a confessor does not take the stand at trial and his confession is introduced into evidence, there is a "substantial risk that the jury, despite instructions to the contrary[will] look[] to the incriminating extrajudicial statements" in determining the guilt or innocence of the nonconfessing codefendant, in violation of that defendant's Sixth Amendment right of cross-examination. *Id.* at 126, 88 S. Ct. at 1622; *see also Jackson*, 378 U.S. at 389, 84 S. Ct. at 1787. Limiting instructions were perceived by the Court as not being "an adequate substitute" for a codefendant's constitutional right of cross-examination: "The effect is the same as if there had been no instruction at all." 391 U.S. at 137; 88 S. Ct. at 1628. The *Bruton* Court then held, as we indicated, that, because of the "substantial

risk" that the jury would consider an incriminating confession against the confessor's codefendant despite limiting instructions, the confession cannot be admitted in evidence unless the codefendant has the opportunity to cross-examine the confessor.

As stated, *Bruton* acknowledged that which the *Delli Paoli* dissenters had broached, *i.e.*, the possibility that a jury may not follow a curative instruction to disregard a confession in determining the guilt or innocence of a confessor's codefendant. Indeed, in *Delli Paoli*, the Court had sanctioned the use of limiting instructions. It was not until *Bruton* that the Court fully acknowledged that it was not realistic to assume that juries would follow the instruction once privy to information implicitly or explicitly inculpating the confessor's codefendant. 391 U.S. at 126; 88 S. Ct. at 1622. One approach suggested by the Court, that had been in use in several states, was the practice of deleting, or redacting, any references to the codefendant from the statement being introduced.

This practice was challenged in *Richardson v. Marsh, supra*, where the Supreme Court declined to extend *Bruton* and upheld the practice whereby the codefendant's name, as well as her existence, were eliminated and a curative instruction was given at the time the statement was admitted and again when the jury was charged. Over her objection, Clarissa Marsh and one Benjamin Williams were jointly tried on charges of murder, robbery, and assault.[2] At

[2] A third suspect, Kareem Martin, was a fugitive at the time of the trial.

trial, the State successfully introduced a confession the police had elicited from Williams following his arrest. It had been redacted to omit any reference to Marsh — in fact, as read into evidence, it appeared that no one other than Williams and Martin had participated in the crime.[3] At the time that the redacted

[3] Williams's redacted confession in its entirety read:

> "On Sunday evening, October the 29th, 1978, at about 6:30 p.m., I was over to my girl friend's house at 237 Moss, Highland Park, when I received a phone call from a friend of mine named Kareem Martin. He said he had been looking for me and James Coleman, who I call Tom. He asked me if I wanted to go on a robbery with him. I said okay. Then he said he'd be by and pick me up. About 15 or 20 minutes later Kareem came by in his black Monte Carlo car. I got in the car and Kareem told me he was going to stick up this crib, told me the place was a numbers house. Kareem said there would be over $5,000 or $10,000 in the place. Kareem said he would have to take them out after the robbery. Kareem had a big silver gun. He gave me a long barrelled [sic] .22 revolver. We then drove over to this house and parked the car across the big street near the house. The plan was that I would wait in the car in front of the house and then I would move the car down across the big street because he didn't want anybody to see the car. Okay, Kareem went up to the house and went inside. A couple of minutes later I moved the car and went up to the house. As I entered, Kareem and this older lady were in the dining room, a little boy and another younger woman were sitting on the couch in the front room. I pulled my pistol and told the younger woman and the little boy to lay on the floor. Kareem took the older lady upstairs. He had a pistol, also. I stayed downstairs with the two people on the floor. After Kareem took the lady upstairs I went upstairs and the lady was laying on the bed in the room to the left as you get up the stairs. The lady had already given us two bags full of money before
> (continued...)

confession was admitted, the court instructed the jury not to consider it in any way against Marsh. With the confession redacted, the only evidence that linked Marsh to the crime was: 1) Marsh's own testimony, in which she admitted that she was in the car with Williams and Martin while driving to the victims' house, and 2) Williams's confession that, while driving to the victims' house, he and Martin discussed their intent to rob and kill the victims. Marsh alleged that *Bruton* was dispositive of her claims; that introduction of Williams's confession violated her constitutional rights under the Confrontation Clause. The Court held that the admission of Williams's confession with the proper limiting

[3](...continued)

> we ever got upstairs. Kareem had thought she had more money and that's why we had went upstairs. Me and Kareem started searching the rooms but I didn't find any money. I came downstairs and then Kareem came down with the lady. I said, 'Let's go, let's go.' Kareem said no. Kareem then took the two ladies and little boy down the basement and that's when I left to go to the car. I went to the car and got in the back seat. A couple of minutes later Kareem came to the car and said he thinks the girl was still living because she was still moving and he didn't have any more bullets. He asked me how come I didn't go down the basement and I said I wasn't doing no shit like that. He then dropped me back off at my girl's house in Highland Park and I was supposed to get together with him today, get my share of the robbery after he had counted the money. That's all."

Richardson v. Marsh, 481 U.S. 200, 205 n.1, 107 S. Ct. 1702, 1705 n.1 (1987).

instruction had not impinged upon Marsh's right of confrontation because the confession did not name her as a perpetrator of the crime or indicate that she was in any way involved in it. *Richardson*, 481 U.S. at 211, 107 S. Ct. at 1709. Rather, it was her own testimony, placing her in the same car with Williams and Martin while they discussed their intent to rob and kill the victims, that tied her to the crimes.

The Court explained that, in *Bruton*, it had recognized a "narrow exception" to the general assumption that jurors follow the instructions given to them. Where a confessing codefendant does not take the stand, the Court opined, "the risk that the jury will not . . . follow instructions is so great, and the consequences of failure so vital to the [nonconfessing] defendant" that it would not presume that jurors, under those circumstances, would follow instructions. 481 U.S. at 207, 107 S. Ct. at 1707 (quoting *Bruton*, 391 U.S. at 135, 88 S. Ct. at 1627)). Under the facts presented in *Richardson*, where the references to Marsh were redacted, Williams's confession was only inferentially incriminating — that is, incriminating only when linked with other evidence adduced at trial. In such a circumstance, "the judge's instruction may well be successful in dissuading the jury from entering onto the path of inference in the first place, so that there is no incrimination to forget." *Id.* at 208, 107 S. Ct. at 1708. The same cannot be said for confessions that specifically reference a codefendant's complicity in the perpetration of the crime, such as that evinced in *Bruton*.

There, Evans's confession directly implicated Bruton as a perpetrator. It was precisely this type of confession that prompted the Court to carve out its exception: "Specific testimony that 'the defendant helped me commit the crime' is more vivid than inferential incrimination, and hence more difficult to thrust out of mind," the Court opined. 481 U.S. at 208, 107 S. Ct. at 1708. There did not, in *Richardson*, "exist the overwhelming probability of the[jurors'] inability to [disregard the incriminating inference] that is the foundation of Bruton's exception to the general rule."[4] *Id.*

While holding that Marsh had been accorded her constitutional rights, the Court stated, however, that it expressed "no opinion on the admissibility of a confession in which the defendant's name has been replaced with a symbol or neutral pronoun." *Richardson*, 481 U.S. at 211 n.5, 107 S. Ct. at 1709 n.5. Indeed, neither the Supreme Court nor any Maryland appellate court has ever addressed the constitutional ramifications of replacing a defendant's name with a symbol or neutral word in an incriminating statement made by a codefendant.

Surveying other jurisdictions that have faced this issue, we find persuasive the reasoning and analysis employed by the D.C.

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[4] The Court then went on to detail the problems inherent in applying the *Bruton* exception to only inferentially inculpatory evidence: "If extended to confessions incriminating by connection, not only is [compliance with *Bruton* by redaction] not possible, but it is not even possible to predict the admissibility of a confession in advance of trial." *Richardson*, 481 U.S. at 209, 107 S. Ct. at 1708.

Court of Appeals in *Smith v. United States*, 561 A.2d 468 (1989), wherein a symbol was used in the place of Smith's name in his codefendant's redacted statement to police. There, Smith and one Harris were tried together on a number of robbery charges. Harris had confessed prior to trial and named Smith as his accomplice. Prior to its admission, Harris's confession was redacted "by 'whiting out' all references to Smith and then penciling a rectangular boundary around each remaining blank space." 561 A.2d at 473. Fourteen such rectangular symbols appeared on Harris's two-page confession. In reviewing its impact upon Smith's Sixth Amendment rights, the D.C. Court of Appeals said:

> [A] properly and effectively redacted statement substituting neutral references for names (including nicknames and the like) and/or descriptions . . . may be admitted into evidence at a joint trial (when coupled with proper limiting instructions) unless a 'substantial risk' exists that the jury will consider that statement in deciding the guilt of the defendant. *In order to determine whether a substantial risk exists, the trial court must consider the degree of inference the jury must make to connect the defendant to the statement and the degree of risk that the jury will make that linkage despite a limiting instruction*. The trial court's assessment as to whether the redaction effectively avoids linkage with the defendant must be made in the context of other evidence admitted at trial.[5]

Id. at 474 (emphasis added; citations and quotations omitted; omission in original). The court then held that, in light of the other evidence adduced at trial, there was a substantial risk that

[5] This approach is known as the contextual analysis of *Bruton* questions.

the jury had relied on Harris's confession in determining Smith's guilt; the jury was "virtually invited . . . to use Smith's name to 'fill in the blanks.'" *Id.*

In the case *sub judice*, in moving the trial court to sever appellant's trial from Bell's, appellant's defense counsel argued:

> Mr. Bell's statement, in its totality and in various parts, clearly is indicating a group activity in the beating death of Mr. Stacey Williams.
>
> Therefore, it can only be inferred when these two gentlemen are sitting at the same defense table, that when [Bell] was implicating . . . himself, that he . . . must have implicated Mr. Gray.
>
> Because we have no right to cross examine Mr. Bell as to his statement, Your Honor, I believe that the entire statement must be excluded, or in the alternative a severance must be granted. I think *Bruton* makes it clear that the reason for the red line type rule announced in *Bruton* was because of the fact that [appellant] would be denied his right to confrontation, and it would be a logical inference drawn by a jury that if one client made a statement concerning a group activity and two people are on trial for that group activity, by implication the statement goes to the detriment of Mr. Gray . . . .

The trial court denied the motion:

> It seems to me . . . that there is not a difficulty here with a statement which involves two people where we redact the name of the defendant who is making the motion, that there's going to be this compelling implication to the jury that the name that's been redacted or left out must be the name of the co-defendant.
>
> To the contrary, I think that where you've got group activity and the evidence here is, apparently, going to be that there were at least five, and maybe as many as six

men involved in this assault on the victim, to redact this statement, it seems to me, will not unduly prejudice Mr. Gray.

It seems to me that this statement can be sanitized in about three different spots so as to remove the names of Tank and Mr. Gray and the jury will not be left with the unavoidable inference or implication that the person Mr. Bell is referring to in the statement is Mr. Gray.

. . . .

. . . I just don't see any prejudice befalling Mr. Gray if we can adequately sanitize this statement and take out any indication from Mr. Bell contained in this statement of the identity of anybody else who was involved in the assault. Not just Mr. Gray's name, but we're going to take out all of the names because the evidence is going to be that there were six people involved, and, therefore, to take out all of the names, that will not hurt Mr. Gray, it seems to me.

[APPELLANT'S ATTORNEY]: Well, Your Honor, the jury only has one other person to choose from because there are not five or six people on trial.

THE COURT: Oh, no. Well, I'll instruct the jury that the involvement or alleged involvement, or if the evidence seems to suggest that others are involved, obviously, they're not to consider that the others involved are not on trial. They should not speculate as to why others said to have been involved are not on trial. They are to consider only the evidence against each of the defendants in reaching their verdicts, and, of course, I would instruct the jury that they are not to consider Mr. Bell's statement as evidence against Mr. Gray . . . . But I think that the redaction of the statement together with the instructions will avoid any prejudice to Mr. Gray.

[APPELLANT'S ATTORNEY]: The whole proposition of *Bruton* is that such a limiting in-

struction will not work in this type of situation.

THE COURT: . . . I made this ruling, of course. In addition to the fact that, according to the State's proffer, there will be eyewitness identification of both defendants as among the six who committed the deadly assault on Mr. Williams.

[APPELLANT'S ATTORNEY]: Yes, but if the witnesses, if they do identify Mr. Bell and Mr. Gray as being among those six individuals, and then add to that a statement where Mr. Bell states that he was involved in the beating —

THE COURT: It makes the case against Mr. Bell simply stronger than Mr. Gray.

[APPELLANT'S ATTORNEY]: And it makes the case against Mr. Gray stronger.

THE COURT: I don't think so. I don't think so.

[APPELLANT'S ATTORNEY]: Because two people are named, one of them admits, oh, yes, I was involved, that clearly makes the evidence of that one witness appear more believable, and that witness is stating that two people were recognized.

THE COURT: I understand your position. Your motion for severance is denied.

Detective Pennington read Bell's redacted statement to the jury. In pertinent part, that which was read included:[6]

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[6] Prior to the statement being read into evidence, the court admonished the jury that the statement

> is to be considered . . . as evidence against Mr. Bell only and in no way is . . . [it] to be considered . . . as evidence against Mr. Gray. It is evidence against Mr. Bell only, and . . . you will consider the evidence against each of the defendants individually and reach a separate verdict as to each defendant.

Question, what can you tell me about the beating of Stacey Williams that occurred on 10, November, 1993?

Answer, an argument broke out between *deletion* and Stacey in the 500 block of Louden Avenue. Stacey got smacked and then ran onto Wildwood Parkway. Me, *deleted*, and a few other guys ran after Stacey. We caught up to him on Wildwood Parkway. We beat Stacey up. After we beat Stacey up, we walked him back to Louden Avenue. I then walked over and used the phone, Stacey and the others walked down Louden.

Question, when Stacey was beaten on Wildwood Parkway, how was he beaten?

Answer, hit, kicked.

Question, who hit and kicked Stacey?

Answer, I hit Stacey. He was kicked, but I don't know who kicked him.

Question, who was in the group that beat Stacey?

Answer, me, *deleted*, *deleted*, and a few other guys.

Question, do you know the other guy's name?

Answer, *deleted*, *deleted*, and me. I don't remember who was out there.

Question, did anyone pick Stacey up and drop him to the ground?

Answer, no, when I was there.

Question, what was the argument over between Stacey and *deleted*?

Answer, some money that Stacey owed *deleted*.

Question, how many guys were hitting on Stacey?

Answer, about six guys.

Question, do you have a black jacket with Park Heights written on the back?

Answer, yea.

Question, who else has these jackets?

Answer, *deletion*.

Question, after reading this statement, would you sign it?

Answer, yes. He then signed it. [Emphasis added].

In reading the statement to the jury, where the written version indicated "deleted" and "deletion," Detective Pennington spoke the words "deleted" and "deletion."

Evidence otherwise directly implicating appellant in the commission of the crime came from two individuals — Tracey Brumfield and Shay Yarberough. Brumfield, a witness only to the chase, testified that appellant and Tank were among a group of twelve young men chasing Stacey Williams down the street, approximately ten to twelve feet behind him. She did not recognize the others in the group, getting only a four to five second glance at all of them as they passed approximately six feet in front of her. She admitted that she knew Tank and appellant were friends and were frequently seen together. She did not recognize Bell as one of the men chasing Williams. She stated that she then ran into Yarberough and that the two walked to the house of Williams's girlfriend. Yarberough testified that he witnessed Williams's beating from across the street and could only name Tank, appellant, and Bell as

among the six individuals involved in the fray. He then described how Tank and appellant hit Williams and dropped him on his head several times. Bell was also seen hitting Williams. On cross-examination, however, it was revealed that, among other inconsistencies, Yarberough had apparently provided a statement to the police different from his testimony at trial, in which he stated he saw the altercation but did not know the identities of those involved in it.

In determining whether Bell's statement was sufficiently redacted, the trial court had to assess *Bruton*'s "substantial risk" criterion in light of the degree of inference the jury would have had to make to connect appellant to Bell's statement and the degree of risk that the jury would have linked the two despite a limiting instruction. *See Smith*, 561 A.2d at 474.

Mere deletion of appellant's (and Tank's) name did not effectively make Bell's statement nonincriminating as to appellant. In the context of other evidence (Brumfield's and Yarberough's testimony), the jury need only have taken a short step in inferring that appellant was one of those involved. Stated otherwise, it did not have to make a substantial inference that appellant was the person neutrally referenced in the redacted statement. Therefore, there existed a "substantial risk" that the jury considered the statement in deciding appellant's guilt. Indeed, with Tank dead, the jury was "virtually invited . . . to use [appellant]'s name to 'fill in the blanks.'" *Id.* Simply stated, the use of "deleted" or "deletion" was insufficient to protect appellant against "the prac-

tical and human limitations of the jury system." *Bruton*, 391 U.S. at 135, 88 S. Ct. at 1627. *See also Greenwell v. United States*, 336 F.2d 962, 969 (D.C. Cir. 1964) (replacing name of defendant with neutral term such as "named person" insufficient redaction since "with other evidence . . . connecting the co-defendants in the commission of the crime, it is difficult to believe that the jury was unable to divine who the 'anonymous nobody' referred to in the confession was"), *cert. denied*, 380 U.S. 923, 85 S. Ct. 921 (1965). Although, as the State argues, there were six perpetrators, any one of which the jury could infer was referred to by the deletions, only three were positively identified — Bell, appellant, and Tank. Appellant's role was clearly demonstrated by Bell's statement, rendering it facially incriminating and constitutionally violative. "To hold that there was not a substantial risk that the[jury] would consider th[e] evidence . . . in considering [a codefendant]'s guilt (limiting instruction or not) would require us to wink at the reality of human behavior of jurors as recognized by the Court in both *Bruton* and *Richardson v. Marsh*." *Foster v. United States*, 548 A.2d 1370, 1379 (D.C. App. 1988).

Thus, the instant case represents a point on the continuum between *Bruton* and *Richardson* "where one cannot have the requisite degree of assurance that the jury will not improperly consider the evidence in deciding the guilt of the defendant against whom the evidence is not admissible despite a proper limiting instruction." *Foster*, 548 A.2d at 1378. We add further that we distinguish

Richardson v. Marsh by the manner of redaction employed. In *Richardson*, Marsh's role in the perpetration of the crime had been totally eliminated. There was no indication that anyone other than Williams and Martin committed the crime. In the instant case, however, appellant's role was disclosed, albeit with reference to a neutral person. Bell was not portrayed as solely having assaulted Williams and the jury could reasonably infer that it was appellant whose name had been "deleted."

Given our conclusion that there existed a violation of appellant's constitutional rights, we now subject that violation to further analysis to determine whether it was harmless beyond a reasonable doubt. *See Chapman v. California*, 386 U.S. 18, 22-23, 87 S. Ct. 824, 826-27 (1967) (Not all constitutional errors mandate reversal). Maryland courts employ a harmless error analysis in addressing federal constitutional errors. See *Adam and Green v. State*, 14 Md. App. 135, 144 (1972), *Shedrick and Beckwith v. State*, 10 Md. App. 579, 585 (1970), and *Hamm, Lee, Bailey, and Cole v. State*, 7 Md. App. 474, 484 (1969) in the context of Sixth Amendment *Bruton*-type issues. As set forth in *Chapman*, 386 U.S. at 24, 87 S. Ct. at 828, and restated in *Harrington v. California*, 395 U.S. 250, 254, 89 S. Ct. 1726, 1728 (1969), whether an error is harmless beyond a reasonable doubt "is to be based on an independent 'reading of the record and on what seems . . . to have been the probable impact . . . [of the tainted evidence] on the minds of an average jury.'" *Younie v. State*, 272 Md.

233, 246 (1974) (quoting *Harrington*, 395 U.S. at 254, 89 S. Ct. at 1728) (omissions and brackets in original). In other words, a constitutional error is not considered harmless if there is a reasonable possibility that improperly admitted evidence contributed to the conviction being challenged. *Schneble v. Florida*, 405 U.S. 427, 432, 92 S. Ct. 1056, 1060 (1972). Unless the State can prove that the defendant would undoubtedly have been found guilty in the absence of the allegedly tainted evidence, its use will always be error. *Younie*, 272 Md. at 246-47. If, on the other hand, the State can show beyond a reasonable doubt that the violation is technical or the evidence cumulative of other overwhelmingly inculpatory evidence, no error will be found. *Id.* at 247.

In *Harrington v. California, supra*, the Supreme Court granted *certiorari* to determine whether admission of the statements of Harrington's codefendants, in violation of *Bruton*, nonetheless was harmless beyond a reasonable doubt, as sanctioned in *Chapman v. California, supra*. In *Harrington*, four men were jointly tried on robbery and murder charges. The respective confessions of Harrington's three codefendants were introduced at trial, tempered by appropriate limiting instructions.[7] Harrington's own testimony, as well as that of the testifying confessor, placed Harrington at the scene of the crime. Though varying, accounts of his possession of a gun and the extent of his participation in the commission of the crime were

[7] One of the confessors took the stand and, thus, was subject to defense counsels' cross-examination.

elicited from other witnesses. The Court began by recognizing *Chapman*'s axioms that no federal constitutional error is harmless unless held to be harmless beyond a reasonable doubt and that not all constitutional errors call for reversal of a petitioner's conviction. 395 U.S. at 251-52, 89 S. Ct. at 1727. The Court concluded that, in that case, harmless error existed despite clear *Bruton* violations, even in spite of the cumulative nature of the nontestifying codefendants' confessions, "[b]ut apart from them," because the other evidence "was so overwhelming." *Id.* at 254, 89 S. Ct. at 1728. The Court further rejected the suggestion that, if the mind of one juror was tainted by the violative confessions, reversal was mandated. Its judgment, the Court opined, "must be based on our own reading of the record and on what seems to us to have been the probable impact of the two confessions on the minds of an average jury." *Id.*

In the case *sub judice*, we are not persuaded by the State's assertion that the testimony of Brumfield and Yarberough, in addition to that of the medical examiner,[1] were "substantial evidence" of appellant's guilt so as to render a *Bruton* violation, if any, harmless beyond a reasonable doubt. In view of the conflicting evidence of appellant's presence *vel non* at the scene, the jury may well have considered Bell's statement to have enabled

[1] The medical examiner testified that Williams died as a result of trauma to his head, such as caused by being struck on a hard surface.

the State to overcome its burden of proof beyond a reasonable doubt. If so, it may have resulted in appellant's conviction. Simply because other evidence tends to inculpate a defendant does not render the use of a codefendant's statement, admitted in violation of *Bruton*, harmless beyond a reasonable doubt. Indeed, the testimony of the witnesses on which the State relies may not have been compelling at all in the minds of the jurors. Brumfield was not herself a witness to the altercation that resulted in Williams's death and Yarberough's allegedly differing statements could have adversely affected his credibility. Bell's statement "might well have tipped the balance in the jurors' minds in favor of conviction." *Harrington*, 395 U.S. at 257, 89 S. Ct. at 1730 (Brennan, J., dissenting). We are unable to hold that the use of Bell's statement, which we have determined violated appellant's right to confrontation, did not result in appellant's conviction.

Thus, we hold that the statement was ineffectively redacted and its use at the joint trial deprived appellant of his right of confrontation. We further hold that it was not harmless beyond a reasonable doubt. Accordingly, we reverse and remand for a new trial.

JUDGMENT REVERSED; COSTS TO BE PAID BY THE MAYOR AND CITY COUNCIL OF BALTIMORE.

ORIGINAL

Supreme Court, U.S.
FILED
MAY 12 1997
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No. 96-8653

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

KEVIN D. GRAY,

Petitioner

v.

STATE OF MARYLAND,

Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF MARYLAND

BRIEF IN OPPOSITION

J. JOSEPH CURRAN, JR.
Attorney General of Maryland

GARY E. BAIR*
RACHEL MARBLESTONE KAMINS
Assistant Attorneys General

Office of the Attorney General
Criminal Appeals Division
200 Saint Paul Place
Baltimore, Maryland 21202
(410) 576-6422

Counsel for Respondent

* Counsel of Record

QUESTION PRESENTED

Does the introduction of a non-testifying codefendant's inculpatory statement, which is redacted to exclude the names of all those involved in the crime by using the words "deleted" and "deletion," comport with a defendant's rights under the Confrontation Clause of the Sixth Amendment where the redacted statement does not expressly implicate the defendant and the jury is instructed to consider the statement only against the co-defendant?

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No. 96-8653

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

KEVIN D. GRAY,

Petitioner

v.

STATE OF MARYLAND,

Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF MARYLAND

BRIEF IN OPPOSITION

Respondent, State of Maryland, respectfully requests that this Court deny the petition for writ of certiorari of Petitioner, Kevin D. Gray.

OPINIONS BELOW

The reported opinion of the Court below, *State of Maryland v. Kevin D. Gray*, 344 Md. 417, 687 A.2d 660 (1997), is reproduced as an appendix to the petition for writ of certiorari. (Pet. for Cert. App. 1-23). The reported opinion of the Court of Special Appeals of

Maryland, *Gray v. State*, 107 Md. App. 311, 667 A.2d. 983 (1995), also is reproduced as an appendix to the petition for writ of certiorari. (Pet. for Cert. App. 24-46). The opinion of the Circuit Court for Baltimore City, Maryland, is reproduced in Appendix A herein. (1a-5a).

STATEMENT OF JURISDICTION

Petitioner has invoked the jurisdiction of this Court pursuant to 28 U.S.C. § 1257(a).[1]

CONSTITUTIONAL PROVISION

United States Constitution, Amendment VI provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

STATEMENT OF THE CASE

Six young men beat Stacey Williams to death on November 10, 1993. (Pet. for Cert. App. 1). Anthony Bell, one of the participants, gave a written statement to the police implicating himself, Gray, and another individual known as "Tank" in Williams's death. (*Id.*). These three individuals were the only persons identified

[1] Gray cites § 1257(3), the predecessor to § 1257(a).

by name as having been involved in the beating. (*Id.* at 2).

Gray and Bell were scheduled to be tried jointly. (*Id.*). Prior to trial, Gray moved to exclude from evidence the statement of Bell or, in the alternative, to sever his trial from Bell's. (*Id.*). In denying the severance motion, the court ruled as follows:

> All right. It seems to me in that light, that there is not a difficulty here with a statement which involves two people where we redact the name of the defendant who is making the motion, that there's going to be this compelling implication to the jury that the name that's been redacted or left out must be the name of the co-defendant [Gray].
>
> To the contrary, I think that where you've got group activity and the evidence here is, apparently, going to be that there were at least five, and maybe as many as six men involved in this assault on the victim, to redact this statement, it seems to me, will not unduly prejudice Mr. Gray.
>
> It seems to me that this statement can be sanitized in about three different spots so as to remove the names of Tank and Mr. Gray and the jury will not be left with the unavoidable inference or implication that the person Mr. Bell is referring to in the statement is Mr. Gray.

(1a-2a). Prior to the admission of the redacted statement into evidence, and again in its jury instructions at the close of the evidence, the court admonished the jury to consider Bell's statement as

evidence against Bell only, and not against Gray. (Pet. for Cert. App. 18).

When the statement was read into evidence by the detective who had interrogated Bell, the words "deletion" and "deleted" were used interchangeably in place of the redacted names of Gray and the other named individual. (*Id.* at 3). Bell's statement, as it was read aloud to the jury, was as follows:

> Question, what can you tell me about the beating of Stacey Williams that occurred on 10, November, 1993?
>
> Answer, an argument broke out between *deletion* and Stacey in the 500 block of Louden Avenue. Stacey got smacked and then ran onto Wildwood Parkway. Me, *deleted*, and a few other guys ran after Stacey. We caught up to him on Wildwood Parkway. We beat Stacey up. After we beat Stacey up, we walked him back to Louden Avenue. I then walked over and used the phone, Stacey and the others walked down Louden.
>
> Question, when Stacey was beaten on Wildwood Parkway, how was he beaten?
>
> Answer, hit, kicked.
>
> Question, who hit and kicked Stacey?
>
> Answer, I hit Stacey. He was kicked, but I don't know who kicked him.
>
> Question, who was in the group that beat Stacey?
>
> Answer, me, *deleted*, *deleted*, and a few other guys.
>
> Question, do you know the other guy's name?

> Answer, *deleted*, *deleted*, and me. I don't remember who was out there.
>
> Question, did anyone pick Stacey up and drop him to the ground?
>
> Answer, no when I was there.
>
> Question, what was the argument over between Stacey and *deleted*?
>
> Answer, some money that Stacey owed *deleted*.
>
> Question, how many guys were hitting on Stacey?
>
> Answer, about six guys.
>
> Question, do you have a black jacket with Park Heights written on the back?
>
> Answer, yea.
>
> Question, who else has these jackets?
>
> Answer, *deletion*.
>
> Question, after reading this statement, would you sign it?
>
> Answer, yes. He then signed it.

(*Id.* at 17-18). The copy of the statement admitted into evidence had blank white spaces where the names once appeared. (*Id.* at 3).

An eyewitness testified at trial that she saw Gray, Tank, and several other individuals chase the victim down the street immediately prior to the beating. (*Id.* at 2). Another witness testified that Tank punched Williams several times and that Gray and Tank picked the victim up

and dropped him on his head onto the sidewalk repeatedly. (*Id.*). Gray testified in his own defense and claimed to have been speaking to his girlfriend on a nearby pay phone at the time of the beating. (*Id.* at 3). Gray called other witnesses to support his claim that he was not involved in the beating. (*Id.*). Bell did not testify at the joint trial. (*Id.*). The jury found Gray guilty of involuntary manslaughter. (*Id.*).

Gray's conviction was affirmed by the Court of Special Appeals of Maryland on December 4, 1995. (*Id.* at 4, 24). The intermediate appellate court held that there existed a "substantial risk" that the jury would consider the confession as evidence of his guilt because the use of the words "deleted" and "deletion" was insufficient to make the statement nonincriminating as to Gray. (*Id.* at 41-42). Adopting a "contextual linkage" analysis, the court concluded that Gray's role in the crime was "clearly demonstrated" by his codefendant's confession, "rendering it facially incriminating and constitutionally violative." (*Id.* at 42).

The State of Maryland filed a petition for writ of certiorari to the Court of Appeals of Maryland, which was granted on April 17, 1996. On January 15, 1997, the Court of Appeals of Maryland reversed the judgment of the Court of Special Appeals. (*Id.* at 21). Maryland's

highest court rejected the "contextual" or "evidentiary linkage" analysis employed by the intermediate appellate court and adopted instead the "facial implication" doctrine, holding that "a Bruton violation occurs when a codefendant's confession, either facially, or by compelling and inevitable inference, inculpates a nonconfessing defendant." (*Id.* at 15, 20). Otherwise, the court stated, the general and strong presumption that jurors follow their instructions is not overcome. (*Id.* at 16).

REASONS FOR DENYING THE WRIT

THIS COURT SHOULD DENY REVIEW BECAUSE THE DECISION OF THE LOWER COURT WAS CORRECT.

This Court should deny Gray's petition because the decision of the Court of Appeals of Maryland follows logically in the footsteps of *Bruton v. United States*, 391 U.S. 123, 135-36 (1968), and *Richardson v. Marsh*, 481 U.S. 200 (1987). Maryland's highest court correctly concluded that the introduction of a non-testifying codefendant's inculpatory statement, which was redacted to exclude the names of all those involved in the crime by using the words "deleted" and "deletion," comported with Gray's rights under the Confrontation Clause of the Sixth Amendment because the redacted statement did not

expressly implicate Gray and the jury was instructed not to consider the statement as evidence of Gray's guilt.

At issue in *Bruton* was the admission of a co-defendant's confession naming the defendant as his accomplice. 391 U.S. at 124. This Court noted the substantial risk that the jury would consider the incriminating confession against the confessor's co-defendant, notwithstanding the trial court's instructions to the jury to disregard the confession in determining Bruton's guilt and to consider it as competent evidence only against the co-defendant-confessor. *Id.* at 135-36.

Richardson v. Marsh limited *Bruton* to situations in which facially incriminating statements made by co-defendants are used at trial. In *Richardson*, a co-defendant's confession was redacted to eliminate not only the defendant's name, but any reference to her existence. *Id.* at 211. This Court held that the admission of the confession, coupled with the proper limiting instruction, did not violate Marsh's right of confrontation because the confession did not name Marsh as a perpetrator of the crime nor indicate that she was in any way involved in the crime. *Id.* Thus, the confession in *Richardson v. Marsh* was determined not to be "facially incriminating," as it was in *Bruton*, but, rather, only "inferentially incriminating." *Id.* at 208. In such instances, unlike

confessions which specifically reference the defendant's complicity in the crime, as in *Bruton*, limiting instructions by the trial court were likely to be successful in precluding the jury from inferring the guilt of the defendant from the co-defendant's confession. *Id.*

As Petitioner points out, there is a split of authority among federal and state courts on whether redacting a nontestifying co-defendant's confession by replacing references to the defendant's name with a "symbol or neutral pronoun" avoids violation of a defendant's rights under the Confrontation Clause. Some courts take the position that a redacted confession, in which the name of the defendant has been replaced with symbols or neutral pronouns, is admissible provided that the statement, standing alone, does not connect the defendant to the crime. *See, e.g., United States v. Williams*, 936 F.2d 698, 701 (2d Cir. 1991); *United States v. Strickland*, 935 F.2d 822, 825 (7th Cir.), *cert. denied*, 502 U.S. 917 (1991); *United States v. Benitez*, 920 F.2d 1080, 1087 (2d Cir. 1990); *United States v. Vogt*, 910 F.2d 1184, 1192 (4th Cir. 1990), *cert. denied*, 498 U.S. 1083 (1991); *United States v. Espinoza-Saenez*, 862 F.2d 526, 534 (5th Cir. 1988); *United States v. Gonzales*, 749 F.2d 1329, 1334 (9th Cir. 1984); *State v.*

Craney, 662 A.2d 899, 902 (Me. 1995); *People v. Sutter*, 556 N.Y.S.2d 959, 959 (1990); *Commonwealth v. Sanford*, 470 A.2d 998, 439-440 (Pa. 1984).

Other courts embrace the "contextual linkage" approach, which requires consideration of evidence extrinsic to the confession in determining whether it directly incriminates the non-confessing defendant. *See, e.g., United States v. Hoac*, 990 F.2d 1099, 1107 (9th Cir. 1993), *cert. denied*, 510 U.S. 1120 (1994); *United States v. Van Hemelryck*, 945 F.2d 1493, 1502 (11th Cir. 1991); *United States v. Long*, 900 F.2d 1270, 1280 (8th Cir. 1990); *United States v. Pendegraph*, 791 F.2d 1462, 1465 (11th Cir.), *cert. denied*, 479 U.S. 869 (1986); *Clark v. Maggio*, 737 F.2d 471, 477 (5th Cir. 1984), *cert. denied*, 470 U.S. 1055 (1985); *United States v. Burke*, 700 F.2d 70, 85 (2d Cir.), *cert. denied*, 464 U.S. 816 (1983); *Hodges v. Rose*, 570 F.2d 643, 647 (6th Cir.), *cert. denied*, 436 U.S. 909 (1978); *United States v. Gonzalez*, 555 F.2d 308, 316 (2d Cir. 1977); *People v. Fletcher*, 917 P.2d 187, 197 (Ca. 1996); *Smith v. United States*, 561 A.2d 468, 473-74 (D.C. 1989); *Foster v. United States*, 548 A.2d 1370, 1378-79 (D.C. 1988); *People v. Cruz*, 521 N.E.2d 18, 22-23 (Ill.), *cert. denied*, 488 U.S. 869 (1988); *People v. Khan*, 613 N.Y.S.2d 198, 203-04 (1994); *State v. Johnson*, 321 S.E.2d 510, 513 (N.C. 1984).

The "facial implication" doctrine, adopted by the Court of Appeals of Maryland, is the better reasoned approach and the one which follows directly from this Court's decisions in *Bruton* and *Richardson*. In *Richardson*, this Court discussed the hazards of extending the holding of *Bruton* to confessions that incriminate nondeclarant defendants only when considered in the context of other evidence introduced at the joint trial. First, whereas facial incrimination is usually curable by redaction that eliminates references to co-participants, there may be no effective way to redact a confession that is incriminating to the non-confessing co-defendant only when tied to other evidence. *Richardson*, 481 U.S. at 209.

Second, in ruling on motions to exclude the confession or to sever the trials, the trial judge would be burdened with the task of considering not only the confession itself but also other evidence which typically will not yet have been presented. *Id.* It would often be impossible for a trial judge to predict the admissibility of a confession in advance of the trial. *Id.*

Third, extending the rule of *Bruton* to confessions which are not facially incriminating would result in fewer joint trials, thereby requiring "that prosecutors bring separate proceedings, presenting the same evidence

again and again, requiring victims and witnesses to repeat the inconvenience (and sometimes trauma) of testifying, and randomly favoring the last-tried defendants who have the advantage of knowing the prosecution's case beforehand." *Id.* at 210. As this Court stated in *Zafiro v. United States*, 113 S. Ct. 933, 937 (1993):

> There is a preference in the federal system for joint trials of defendants who are tried together. Joint trials 'play a vital role in the criminal justice system.' They promote efficiency and 'serve the interests of justice by avoiding the scandal and inequity of inconsistent verdicts.' For these reasons we have repeatedly approved of joint trials.

(citations omitted).

Employing the facial implication doctrine here shows that Bell's statement, as redacted, did not name Gray as a participant to the crime, nor did it contain any other reference that readily and unmistakably identified the person referred to as Gray. Because the statement itself did not name or otherwise identify Gray, nor alone serve to connect him with the crime, it was not the type of "facially incriminating" statement contemplated by *Bruton* and *Richardson* and its progeny.

Bell's statement was not facially incriminating of Gray for the additional reason that it implicated five other, unnamed individuals in the commission of the crime

for which he was on trial, any two of whom could have been the persons referred to in the statement as "deleted" and "deletion." Because Bell's statement indicated that five individuals besides Bell participated in the crime, the unnamed entities could have been any of those five persons and did not automatically compel the conclusion that Gray was among them. Numerous courts follow this line of reasoning. *See, e.g. United States v. Washington*, 952 F.2d 1402, 1404-05 (D.C. Cir. 1991), *cert. denied*, 503 U.S. 1009 (1992); *United States v. Donahue*, 948 F.2d 438, 444 (8th Cir. 1991), *cert. denied*, 503 U.S. 976 (1992); *United States v. Briscoe*, 896 F.2d 1476, 1502 (7th Cir.), *cert. denied*, 498 U.S. 863 (1990); *Harris v. State*, 462 S.E.2d 425 (Ga. 1995); *Commonwealth v. Rawls*, 419 A.2d 109, 112-13 (Pa. Super. 1980).

In short, the redacted statement in the instant case created no substantial risk that the jury would consider the statement in deciding the guilt of Gray. Gray was neither identified in the statement nor was he the only other participant in the charged crime so as to make his name the only possible substitution for the word "deleted." Any of the deleted names could have been replaced with the names of, or some other references to, the five other individuals who were at the scene and who participated in the beating of the victim. Bell's

statement, although it tended to implicate Gray when viewed in conjunction with other evidence, did not directly or expressly implicate Gray, and that is all that *Bruton* requires.

"The 'rule—indeed, the premise upon which the system of jury trials function under the American judicial system—is that juries can be trusted to follow the trial court's instructions." *Parker v. Randolph*, 442 U.S. 62, 75 n.7 (1979). As this Court observed in *Richardson*, 481 U.S. at 208, when a confession is only inferentially incriminating, as was the case here, limiting instructions by the trial court are especially likely to be successful in precluding the jury from inferring the guilt of the defendant from the co-defendant's confession. Here, the trial court's instructions to the jury to consider Bell's statement as evidence only against Bell, not Gray, are presumed to have been effective in preventing the jury from improperly inferring Gray's guilt from the confession of his codefendant.

CONCLUSION

For the foregoing reasons, the State of Maryland respectfully requests that the petition for writ of certiorari filed herein be denied.

Respectfully submitted,

J. JOSEPH CURRAN, JR.
Attorney General of Maryland

GARY E. BAIR*
RACHEL MARBLESTONE KAMINS
Assistant Attorneys General

Counsel for Respondent

* Counsel of Record

May 12, 1997

J. JOSEPH CURRAN, JR.
Attorney General

CARMEN M. SHEPARD
DONNA HILL STATON
Deputy Attorneys General

STATE OF MARYLAND
OFFICE OF THE ATTORNEY GENERAL

TELECOPIER NO.
(410) 576-6475

WRITER'S DIRECT DIAL NO.
(410) 576-6422

May 12, 1997

William K. Suter, Clerk
Supreme Court of the United States
1 First Street, N.E.
Washington, D.C. 20543

Re: *Kevin D. Gray v. State of Maryland*
No. 96-8653

Dear Mr. Suter:

I enclose herewith for filing in the above-referenced case an original and ten copies of the Brief in Opposition, together with the required Certificate of Service. Copies of this letter and the enclosures have been served on all parties. Should any questions arise, please contact me at the above address or telephone number.

Very truly yours,

Gary E. Bair
Assistant Attorney General
Chief, Criminal Appeals Division

Counsel for Respondent

GEB:dmlm
Enclosures

cc: George E. Burns, Jr.
Assistant Public Defender

Arthur A. DeLano, Jr.
Assistant Public Defender

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200 Saint Paul Place • Baltimore, Maryland 21202-2021
Telephone Numbers: (410) 576-6300 • D.C. Metro 470-7534
Telephone for Deaf: (410) 576-6372

KEVIN D. GRAY,	*	IN THE
Petitioner,	*	SUPREME COURT
v.	*	OF THE UNITED STATES
STATE OF MARYLAND	*	October Term, 1997
Respondent.	*	No. 96-8653

* * * * *

CERTIFICATE OF SERVICE

I, GARY E. BAIR, a member of the Bar of this Court, hereby certify that on the 12th day of May, 1997, two copies of the Brief in Opposition to the Petition for Writ of Certiorari in the above-captioned case were served by hand-delivery on counsel for Petitioner, George E. Burns, Jr. and Arthur A. DeLano, Jr., Assistant Public Defenders, 6 Saint Paul Street, Suite 1302, Baltimore, Maryland 21202-1608, (telephone: (410) 333-3194). I further certify that all parties required to be served have been served.

GARY E. BAIR
Assistant Attorney General

Office of the Attorney General
Criminal Appeals Division
200 St. Paul Place
Baltimore, Maryland 21202
(410) 576-6422

Counsel for Respondent

FILED
JUL 31 1997
CLERK

(4)

No. 96-8653

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

KEVIN D. GRAY,
Petitioner,

v.

MARYLAND,
Respondent.

On Writ of Certiorari to the Court of Appeals of Maryland

JOINT APPENDIX

STEPHEN E. HARRIS
Public Defender of Maryland
ARTHUR A. DELANO, JR.*
NANCY S. FORSTER
Assistant Public Defenders
6 St. Paul Street—Suite 1302
Baltimore, Maryland 21202
(410) 767-8556
Counsel for Petitioner

* *Counsel of Record*

J. JOSEPH CURRAN, JR.
Attorney General of Maryland
CARMEN M. SHEPARD
Deputy Attorney General
GARY E. BAIR *
MARY ELLEN BARBERA
RACHEL MARBLESTONE KAMINS
Assistant Attorneys General
200 St. Paul Place
Baltimore, Maryland 21202
(410) 576-6422
Counsel for Respondent

PETITION FOR CERTIORARI FILED APRIL 15, 1997
CERTIORARI GRANTED JUNE 16, 1997

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EDITOR'S NOTE

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DOCKET ENTRIES

DATE	PROCEEDINGS
February 16, 1994	Indictment filed charging defendant with murder in the first degree
March 10, 1994	Omnibus Pre-Trial Defense Motion filed
June 17, 1994	Defendant's Motion for Severance Heard and Denied
June 20-24, 1994	Jury Trial
June 24, 1994	Verdict: Count 1: (Murder) Not Guilty; (Involuntary Manslaughter) Guilty
August 1, 1994	Disposition
August 1, 1994	Notice of Appeal filed
December 4, 1995	Opinion of Court of Special Appeals of Maryland filed reversing judgment of conviction and remanding case for new trial
April 17, 1996	Writ of Certiorari issued by Court of Appeals of Maryland
January 15, 1997	Opinion of Court of Appeals of Maryland filed reversing the judgment of the Court of Special Appeals of Maryland and affirming the judgment of conviction of the Circuit Court for Baltimore City

IN THE CIRCUIT COURT
FOR BALTIMORE CITY, MARYLAND

Indictment No. 194047002

STATE OF MARYLAND

versus

KEVIN D. GRAY

June 17, 1994

EXCERPT FROM OFFICIAL TRANSCRIPT OF PROCEEDINGS

(HEARING ON PETITIONER'S MOTION TO SEVER DEFENDANTS)

BEFORE:

THE HONORABLE ANDRE M. DAVIS, JUDGE

* * * *

[3] PROCEEDINGS

MS. STARKS-SAXON: This is State of Maryland versus Anthony Bell, 194045004 and Kevin Gray 194047002.

MR. AMARAL: Good afternoon, Your Honor. For the record, Gill Amaral on behalf of Mr. Bell.

MS. GLANCY: Good afternoon, Your Honor. For the record, Maureen Glancy, on behalf of Mr. Kevin Gray.

MS. STARKS-SAXON: Your Honor, the detective was supposed to meet me at two-fifteen in the victim witness room. I expect him to be here any moment. I don't know why he's so late.

MR. AMARAL: He's been here. Detective Pennington has been here for fifteen or twenty minutes. He just stepped out to use the men's room.

MS. STARKS-SAXON: Maybe he misunderstood because I thought we were going to meet in victim witness.

MS. GLANCY: Your Honor, I just wanted to clarify something for the record. When you asked what motions there were, I was speaking as to what motions there would be testimony on. [4] Depending on the Ruling on this motion, there may be a severance motion pressed and there may be a motion in limine.

THE COURT: I understand.

MS. STARKS-SAXON: Your Honor, I just want to say that Mr. Gray just gave an oral statement. Mr. Bell gave a formal written statement, but any portion involving his co-defendant, we would redact.

THE COURT: I understand, of course. I have reviewed the copy of what purports to be Mr. Bell's statement that was filed together with the State's discovery. I notice that in that statement he seemed to name by nickname perhaps one or two, or perhaps as many as three other people, and so that's what you're referring to Ms. Saxon. If the statement of Mr. Bell is admitted—

MS. STARKS-SAXON: Uh-huh.

THE COURT: —then in a joint trial, the State would agree to redact all portions of the statement where Mr. Bell purports to identify others who were engaged in this activity with him.

MS. STARKS-SAXON: Yes.

MS. GLANCY: Your Honor, my position on [5] that, though, is that that is insufficient because the statement clearly goes to the fact that this was a group activity and the jury could very well infer that the names redacted refer to my client.

THE COURT: That's going to be true in every group situation, Ms. Glancy. I understand what you're saying and I understand your position. You haven't fully articulated it yet, and you'll have an opportunity to do that, but in any redacted statement situation of a joint trial there will be the possibility that the jury could infer that what's missing is the name of the co-defendant. So I'll give you a chance to address that—

MS. GLANCY: Thank you.

THE COURT: —after we've heard the evidence and the argument on the statement itself.

* * * *

[45] MS. GLANCY: Yes, Your Honor. We have filed formally with our omnibus motions a request for severance in this matter. I believe it is [46] imperative on the Court to sever these two cases. Mr. Bell's statement, in its totality and in various parts, clearly is indicating a group activity in the beating death of Mr. Stacey Williams.

Therefore, it can only be inferred when these two gentlemen are sitting at the same defense trial table, that when he was implicating—when he, being Mr. Bell, was implicating himself, that he was, he must have implicated Mr. Gray.

Because we have no right to cross examine Mr. Bell as to his statement, Your Honor, I believe that the entire statement must be excluded, or in the alternative a severance must be granted. I think *Bruton* makes it clear that the reason for the red line type rule announced in *Bruton* was because of the fact that my client would be denied his right to confrontation, and it would be a logical inference drawn by a jury that if one client made a statement concerning a group activity and two people are on trial for that group activity, by implication the statement goes to the detriment of Mr. Gray, and he will not be allowed to cross examine on that.

[47] THE COURT: Thank you, Ms. Glancy. Ms. Saxon on that, let me engage you for a moment. Can

you tell the Court what you expect your evidence to show, apart from Mr. Bell's statement?

MS. STARKS-SAXON: I expect my evidence to show that these two gentlemen were observed beating the victim.

THE COURT: How many people—well, first of all, do you have eyewitnesses to the beating?

MS. STARKS-SAXON: I have one eyewitness to the beating.

THE COURT: One eyewitness to the beating?

MS. STARKS-SAXON: Yea.

THE COURT: How many people will that eyewitness testify participated in the beating?

MS. STARKS-SAXON: It was several people, but it included both of these two.

THE COURT: When you say several people, was it three or was it six? Was it five? Was it four, as best—

MS. STARKS-SAXON: It was six, Your Honor.

[48] THE COURT: So the witness is going to say specifically there were six men. Will the witness say they were all men—

MS. STARKS-SAXON: Uh-huh.

THE COURT: —beating another man?

MS. STARKS-SAXON: Yea.

THE COURT: Will the witness know the defendant, either of the defendants?

MS. STARKS-SAXON: Yes.

THE COURT: From prior acquaintance?

MS. STARKS-SAXON: Yea, he knew them enough to make the identification. He gave the officers the names and he did the photo I.D. He knew them from the community.

THE COURT: I assume this is not a participant?

MS. STARKS-SAXON: No.

THE COURT: So this is a non-participant eyewitness with prior knowledge of, an acquaintance of, both defendants who will testify that he observed the beating, that there were six men beating a seventh man, the

decedent, and that Mr. Gray and Mr. Bell were among the six doing the beating.

MS. STARKS-SAXON: Yes.

[49] THE COURT: And will this witness be one of the photo array witnesses or is this someone—

MS. STARKS-SAXON: One of the photo array witnesses.

THE COURT: Let me see if I can make sure I understand. Will the witness testify—will the evidence show that the witness identified Mr. Gray and Mr. Bell and then was shown a photo array, which included a photograph of Mr. Gray and Mr. Bell respectively?

MS. STARKS-SAXON: Yes.

THE COURT: And confirmed the earlier identification?

MS. STARKS-SAXON: Yes.

THE COURT: So the photo array, in that regard, really wasn't necessary, if you know what I mean?

MS. STARKS-SAXON: Well, it may not be necessary for purposes of the trial. It is necessary in terms of, you know—

THE COURT: That's what I mean.

MS. STARKS-SAXON: —the focus of the investigation.

THE COURT: All right. Apart from the eyewitness, what other evidence will the State [50] present as to the circumstances surrounding the death, just the one eyewitness?

MS. STARKS-SAXON: Well, we have another eyewitness, another witness who saw Kevin—

THE COURT: Mr. Bell.

MS. STARKS-SAXON: —in a group of guys chasing the victim.

THE COURT: You will not have any testimony with respect to Mr. Gray?

MS. STARKS-SAXON: Well, the witness will say there were other boys in the group, but she didn't know them.

THE COURT: She didn't know them. Did she know Mr. Bell or did she simply identify Mr. Bell from a photo array after the incident?

MS. STARKS-SAXON: She did not identify Mr. Bell. She identified Mr. Gray and Tank, the guy who was deceased.

THE COURT: I'm sorry, let's back up. So the second witness will identify Mr. Gray and Mr. Vanlandingham as among the five or six who were chasing Mr. Williams?

MS. STARKS-SAXON: Yes, just let me—I would have to inquire of her in a little more detail as to who was in the group, but she said [51] there was a group running after Stacey.

[51] THE COURT: All right. She did recognize Tank and Mr. Gray, and do you infer from that, that she knew them, again, from the neighborhood or from some earlier familiarity—

MS. STARKS-SAXON: Yes.

THE COURT: —with them?

MS. STARKS-SAXON: Yes.

THE COURT: Any other evidence, other than those two witnesses, eyewitness identifications?

MS. STARKS-SAXON: No, Your Honor, and then the autopsy.

THE COURT: All right. It seems to me in that light, that there is not a difficulty here with a statement which involves two people where we redact the name of the defendant who is making the motion, that there's going to be this compelling implication to the jury that the name that's been redacted or left out must be the name of the co-defendant.

To the contrary, I think that where you've got group activity and the evidence here is, apparently, going to be that there were at least five, and maybe as many as six men involved [52] in this assault on the victim, to redact this statement, it seems to me, will not unduly prejudice Mr. Gray.

It seems to me that this statement can be sanitized in about three different spots so as to remove the names of Tank and Mr. Gray and the jury will not be left with the unavoidable inference or implication that the person Mr. Bell is referring to in the statement is Mr. Gray.

I'll leave to the State over the weekend to take a magic marker or however you want to do it—

MS. STARKS-SAXON: Okay.

THE COURT: —in consultation with Ms. Glancy. It may make more sense to white out by taping over the names and then rephotocopying the statement, if you intend to introduce the statement as an exhibit, which I assume you do.

MS. STARKS-SAXON: Right.

THE COURT: But we'll talk about it next week, and however it can be done most cleanly and most thoroughly, then we'll do it, but, Ms. Glancy, I just don't see any prejudice befalling Mr. Gray if we can adequately sanitize this statement and take out any indication from Mr. [53] Bell contained in this statement of the identity of anybody else who was involved in the assault. Not just Mr. Gray's name, but we're going to take out all of the names because the evidence is going to be that there were six people involved, and, therefore, to take out all of the names, that will not hurt Mr. Gray, it seems to me.

MS. GLANCY: Well, Your Honor, the jury only has one other person to choose from because there are not five or six people on trial.

THE COURT: Oh, no. Well, I'll instruct the jury that the involvement or alleged involvement, or if the evidence seems to suggest that others are involved, obviously, they're not to consider that the others involved are not on trial. They should not speculate as to why others said to have been involved are not on trial. They are to consider only the evidence against each of the defendants in reaching their verdicts, and, of course, I would instruct the jury that they are not to consider Mr. Bell's statement as evidence against Mr. Gray, and I'll tell them that at the voir dire if you want me to, just to make sure that

they understand that Mr. Bell's statement is in no way evidence against Mr. Gray. But I think [54] that the redaction of the statement together with the instructions will avoid any prejudice to Mr. Gray.

MS. GLANCY: The whole proposition of *Bruton* is that such a limiting instruction will not work in this type of situation.

THE COURT: I understand, and I won't give it if you don't want me to give it, if you think it highlights it, either in voir dire or during regular instructions, but I am prepared to give it and I believe you're entitled to it, and I believe under the circumstances Mr. Gray should have the benefit of that instruction.

I made this ruling, of course. In addition to the fact that, according to the State's proffer, there will be eyewitness identification of both defendants as among the six who committed the deadly assault on Mr. Williams.

MS. GLANCY: Yes, but if the witnesses, if they do identify Mr. Bell and Mr. Gray as being among those six individuals, and then add to that a statement where Mr. Bell states that he was involved in the beating—

THE COURT: It makes the case against Mr. Bell simply stronger than Mr. Gray.

[55] MS. GLANCY: And it makes the case against Mr. Gray stronger.

THE COURT: I don't think so. I don't think so.

MS. GLANCY: Because two people are named, one of them admits, oh, yes, I was involved, that clearly makes the evidence of that one witness appear more believable, and that witness is stating that two people were recognized.

THE COURT: I understand your position. Your motion for severance is denied.

* * * *

IN THE CIRCUIT COURT
FOR BALTIMORE CITY, MARYLAND

(Title Omitted)

June 22, 1994

(LIMITING INSTRUCTION AND EXCERPT OF TESTIMONY OF DETECTIVE HOMER PENNINGTON)

* * * *

[20] THE COURT: Thank you, Mr. Amaral. Ladies and gentlemen of the jury, you're about to hear evidence concerning the statement provided by Mr. Bell when he was interviewed by the detective. You should understand, and I will remind you later, that this evidence concerning the statement provided by Mr. Bell is to be considered by you as evidence against Mr. Bell only and in no way is Mr. Bell's statement provided to the detective about which he's about to testify to be considered by you as evidence against Mr. Gray. It is evidence against Mr. Bell only, and as I will instruct you later, you will consider the evidence against each of the [21] defendants individually and reach a separate verdict as to each defendant. You may proceed, Ms. Saxon.

* * * *

[30] Q Okay. Would you read to the ladies and gentlement of the jury what the statement says?

A This is a statement of Anthony Bell taken on 1/14/94 at 0929 hours in the small interview room. The statement taken by Detective Pennington and Detective Ritz.

Question, is your name Anthony Bell?

Answer, yes.

Question, you're nineteen years old and your date of birth is 6/17/74?

Answer, yes.

Question, can you read and write?

Answer, yes.

Question, are you under the influence of alcohol or drugs?

Answer, no.

Question, you were explained your [31] explanation of rights. Do you fully understand them?

Answer, yes.

Question, are you willing to answer questions without an attorney present at this time?

Answer, yes.

Question, has anyone promised you anything if you answer questions?

Answer, no.

Question, what can you tell me about the beating of Stacey Williams that occurred on 10, November, 1993?

Answer, an argument broke out between deletion and Stacey in the 500 block of Louden Avenue. Stacey got smacked and then ran onto Wildwood Parkway. Me, deleted, and a few other guys ran after Stacey. We caught up to him on Wildwood Parkway. We beat Stacey up. After we beat Stacey up, we walked him back to Louden Avenue. I then walked over and used the phone, Stacey and the others walked down Louden.

Question, when Stacey was beaten on Wildwood Parkway, how was he beaten?

Answer, hit, kicked.

[32] Question, who hit and kicked Stacey?

Answer, I hit Stacey. He was kicked, but I don't know who kicked him.

Question, who was in the group that beat Stacey?

Answer, me, deleted, deleted, and a few other guys.

Question, do you know the other guy's name?

Answer, deleted, deleted, and me. I don't remember who was out there.

Question, did anyone pick Stacey up and drop him to the ground?

Answer, no, when I was there.

Question, what was the argument over between Stacey and deleted?

Answer, some money that Stacey owed deleted.

Question, how many guys were hitting on Stacey?

Answer, about six guys.

Question, do you have a black jacket with Park Heights written on the back?

Answer, yea.

Question, who else has these jackets?

[33] Answer, deletion.

Question, after reading this statement, would you sign it?

Answer, yes. He then signed it.

Q All right, now, officer, after he gave you that information, you subsequently were able to arrest Mr. Kevin Gray; is that correct?

A That's correct.

* * * *

IN THE CIRCUIT COURT
FOR BALTIMORE CITY, MARYLAND

(Title Omitted)

June 23, 1994

(TRIAL JUDGE'S INSTRUCTION TO THE JURY AND CLOSING ARGUMENT OF COUNSEL)

* * * *

[49] THE COURT: Ladies and gentlemen, now that you have heard all of the evidence and before you hear the argument of counsel, it is my duty to give you instructions on the law applicable to [50] this case. My instructions will be in two parts. Part one consists of general instructions designed to aid you in your consideration and evaluation of the evidence. Part two consists of specific instructions as to the criminal offenses charged which you will consider and as to which you will return your verdicts.

It is your duty as jurors to follow the law as I state it to you and to apply the law to the facts as you find them from the evidence you have received in this case. You are not to single out any one instruction as stating the law, but you must consider all of these instructions as a whole. You must not be concerned with the wisdom of any rule of law stated in these instructions, regardless of any opinion you may have as to what the law is or what the law ought to be.

My instructions on the law are binding upon you and it would be a violation of your duty to base a verdict in this case upon any view of the law other than that given by me in these instructions. It would also be a violation of your sworn duty to base a verdict in this case upon anything other than the evidence.

Now, as you well know, there are two [51] defendants in this case. They are charged with the same offenses. Felonious homicide, which includes the charges of murder and involuntary manslaughter, and with battery. I will define these charges and their various elements in a few moments.

For ease of reference and to make these instructions as clear as possible, I will from time to time in these instructions refer to the defendants in the singular as the defendant or a defendant, or from time to time I will refer to them in the plural as the defendants or any defendant. You will understand me to include within all such terms each defendant individually, unless I make it clear that I'm referring to only one of the defendants.

You must consider the evidence as it relates to each defendant separately and you must consider separately each offense charged against each defendant. A separate verdict must be returned for each charge against each defendant.

In this connection some of the evidence was admitted only against one of the defendants and not against the other defendant. You must consider such evidence only as it relates to the [52] defendant against whom it was admitted. Each defendant is entitled to have the case decided separately on the evidence that applies to that defendant.

You, the members of the jury, are the judges of the facts. In deciding the facts of this case, you must not be swayed by bias, prejudice, or by public opinion, because our system of law does not permit jurors to be governed by anything but the law and the evidence they receive. It is expected that you will carefully and impartially consider all of the evidence presented in this case, follow the law as stated in these instructions, and reach just verdicts regardless of the consequences.

My conduct during the trial in ruling on motions or objections by counsel, in my comments to counsel, in questions to witnesses, or any comments on the facts of the case while setting forth these instructions, must not

be taken by you as any indication of my opinion as to how you should decide any of the issues in this case.

You should not conclude from any words or conduct of mine that I believe or disbelieve the testimony of any witness or that I have any [53] opinion as to what the verdict in this case should be. You are the sole judges of the believability of any witness and of the facts. If I have said or done anything that seemed to indicate that I had formed an opinion about this case, not only are you not bound by that opinion, but you must disregard it. What the verdicts should be in this case is exclusively your duty and your responsibility.

Statements, objections, and arguments made by the lawyers are not evidence in this case. Do not be influenced by objections or requests to approach the bench, because lawyers have a duty to object to and obtain a ruling on the admission of evidence they believe should be excluded.

It is also their duty to point out to you those things they believe are most significant or most helpful to their side of the case. Remember, though, that when counsel call your attention to certain facts or suggest that you draw certain conclusions, what they say about the evidence is not binding on you. Your own recollection and interpretation of the evidence should control your deliberations.

[54] It is your duty to determine the facts and in so doing you must consider only the evidence I have admitted in this case. The term evidence includes the testimony of each witness and all physical and documentary exhibits admitted into evidence. Testimony and exhibits to which I have sustained an objection or which I have ordered stricken must not be considered by you because these things are not evidence.

While you should consider only the evidence in the case, you are permitted to draw reasonable inferences from the evidence that are justified in light of reason, experience, and common sense. There are two types of

evidence upon which you may base your decision in this case, direct evidence and circumstantial evidence.

Direct evidence is testimony of a witness who asserts actual knowledge of a particular fact, such as an eyewitness to an event. Circumstantial evidence is proof of a chain of facts which point to a particular conclusion based upon reason, experience, and common sense.

The law makes no distinction between the [55] weight to be given either direct or circumstantial evidence. No greater degree of certainty is required of circumstantial evidence than of direct evidence. In reaching your verdict in this case, you should weigh all of the evidence presented, whether direct or circumstantial evidence. You may not convict the defendant unless you find that the evidence when considered as a whole establishes guilt beyond a reasonable doubt as I explained that term in these instructions.

Now, I have said that you must consider all of the evidence. This does not mean, however, that you must believe all of the evidence to be true and accurate. An indispensable ingredient in your evaluation of the evidence is common sense and you are not obligated to accept as true anything merely because someone says it.

You alone are the judges of who and what should be believed. In making this decision you may apply your own common sense and everyday experiences. In determining whether a witness should be believed, you should carefully judge all of the testimony and evidence and the circumstances under which each witness has testified.

[56] You should consider the following factors: The witness' behavior on the stand and way of testifying, the witness' intelligence, whether the witness appeared to you to be telling the truth, whether and the extent to which the witness had an opportunity to see or hear the things about which testimony was given, the accuracy of the witness' memory, whether the witness had a motive not to tell the truth, whether the witness has an interest in the outcome of this case, whether the witness' testimony was

internally consistent, whether the witness' testimony was supported by or contradicted by other evidence, and whether and the extent to which the witness' testimony in court differed from the statements the witness made, if any, prior to trial. You need not believe any witness, even though the testimony of that witness is uncontradicted. In short, you may believe all, part, or none of the testimony or any witness.

A witness who has special training or experience in a given field is permitted to express opinions based on observed or assumed facts to aid you in deciding the issues in the case. In weighing the opinions of an expert, you [57] should consider the expert's experience, training, and skills and the expert's knowledge of the subject matter about which he or she is expressing an opinion.

You should give expert testimony the weight and the value you believe it should have. You are not required to accept any expert's opinion. You should consider an expert's opinion together with all of the other evidence.

The credibility of a witness may be discredited or impeached by contradictory evidence or by evidence that on some former occasion the witness made a statement or acted in a manner inconsistent with his or her testimony in this case on a matter material to the issues. Evidence of this kind may be considered by you in connection with all of the other facts and circumstances in evidence in deciding the weight to be given to the testimony of the witness.

In this, as in every criminal case, the defendant is presumed to be innocent of all crimes charged until he has been proven guilty beyond a reasonable doubt. The defendant comes into court clothed with this presumption and it remains with the defendant throughout the trial.

[58] The indictments filed against the defendants are not evidence of guilt. These documents are merely complaints which formally bring the defendant into court and which let the defendant know what the charges are. One of the original charges is no longer part of the case and must not concern you. You should not concern yourself

as to the reasons why that charge is not before you, and you should not concern yourself with the fact that others who may be implicated in the criminal offenses are not before you for trial.

The burden of proving the defendant guilty is upon the State and the defendant has no burden to sustain and does not have to prove his innocence. The State has the burden to prove every fact necessary to establish the elements of the offenses with which the defendant is charged. The State must establish the defendant's guilt beyond a reasonable doubt.

This burden does not require the State to prove guilt beyond all possible doubt or to a mathematical certainty, nor is the State required to negate every conceivable circumstance of innocence. A reasonable doubt is a doubt founded [59] upon reason. It is not a fanciful doubt, or a whimsical doubt, or a capricious doubt. If the evidence is of such a character as to persuade you of the truth of the charges against the defendant with the same force that would be sufficient to persuade you to act without reservation in an important matter in your own business or personal affiairs, then you may conclude that the State has met its burden of proof to prove the defendant's guilt beyond a reasonable doubt.

On the other hand, if you are not satisfied of the defendant's guilt to that extent, then reasonable doubt exists and the defendant must be found not guilty.

I will now instruct you as to the elements to be proved beyond a reasonable doubt by the State in order to establish the defendant's guilt of the offenses charged. The burden is on the State to prove beyond a reasonable doubt that the offenses were committed and that the defendant was the person who committed it.

You have heard evidence regarding the defendants as the persons who committed the offenses charged. In this connection, you should consider the witness' opportunity to observe the [60] criminal act and the persons committing it, including the length of time the witness had to

observe the persons committing the crime, the witness' state of mind, and any other circumstance surrounding the event.

You should also consider the witness' certainty or lack of certainty and the witness' credibility or lack of credibility, as well as any other factor surrounding the identification.

The identification of a defendant by a single eyewitness as a person who committed an offense, if believed beyond a reasonable doubt, can be enough evidence to convict a defendant.

Each of the defendants is charged with murder, which includes the lesser offense of involuntary manslaughter, and with battery. As to all of these charges, the defendant is charged with having committed these offenses personally or as what is called a principal in the first degree, and also as a principal in the second degree, or as an aider and abettor, that is, that he aided and abetted the commission of these offenses by another person or other persons who are not on trial.

A person who aids and abets in the [61] commission of a crime is as guilty as the actual perpetrator, even though he did not personally commit each of the acts that constitutes the crime. A person aids and abets the commission of a crime by intentionally, willfully, and knowingly associating with the criminal venture with the intent to help commit the crime, being present when the crime is committed, and seeking by some act of his own to make the crime succeed.

In order to prove that the defendant aided and abetted the commission of a crime, the State must prove that the defendant was present when the crime was committed and that the defendant wilfully and knowingly participated with the intent to make the crime succeed.

Presence means being at the scene or close enough to render assistance to the other perpetrators. Willful participation means voluntary and intentional participation in

the criminal act. Some definite and affirmative conduct by the defendant in furtherance of the crime is necessary.

The mere presence of the defendant at the time and place of the commission of the crime, without more, is not enough to prove that the [62] defendant committed or aided and abetted the commission of a crime. However, if presence is proven it is a fact that may be considered along with all of the surrounding circumstances in determining whether the defendant is guilty or not guilty.

Thus, if you find beyond a reasonable doubt that Mr. Williams died as a result of blows to his head, the State need not prove that the defendant personally inflicted the actual blows that directly caused the death of Mr. Williams if the State proves beyond a reasonable doubt that the defendant knowingly and wilfully aided and abetted the person or persons who inflicted those blows.

Evidence has been introduced that the defendant was not there when the crime was committed. You should consider this evidence along with all of the other evidence in this case. Thus, in order to convict the defendant, the State must prove beyond a reasonable doubt that the crime was committed and the defendant committed it, either as a principal in the first degree or as a principal in the second degree.

The defendants are charged with [63] felonious homicide, which includes murder and the lesser included offense of involuntary manslaughter. As to the charge of murder, the State asserts and the law recognizes three alternate theories that you may find, but are not required to find applicable in this case.

Murder is the killing of another person without legal justification or mitigation and, one, with either, A, the intent to kill, or, B, the intent to inflict such serious bodily harm that death would be the likely result or, two, while acting with an extreme disregard for human life. These three theories are the so-called intent to kill theory, the so-called grievous bodily harm theory, and the so-called depraved heart theory of murder.

As to the first two of these theories, specific intent is required, but the State need not prove premeditation or deliberation. In order to convict the defendant of murder under either of the first two theories, the State must prove, one, that the conduct of the defendant or of someone whom the defendant knowingly and wilfully aided and abetted caused the death of Mr. Williams, two, that the defendant or someone who the defendant [64] knowingly and wilfully aided and abetted engaged in the deadly conduct, either with the intent to kill or with the intent to inflict such serious bodily harm that death would be the likely result, three, that the killing was not justified, and, four, that there were no mitigating circumstances.

Intent is a state of mind and ordinarily cannot be proven directly because there is no way of looking into a person's mind. Therefore, a defendant's intent may be shown by surrounding circumstances. In determining the defendant's intent, you may consider the defendant's acts and statements and the acts and statements of any person who you determine beyond a reasonable doubt the defendant knowingly and wilfully aided and abetted, as well as the surrounding circumstances.

Further, you may but are not required to infer that a person ordinarily intends the natural and probable consequences of his acts. Motive is not an element of the crimes charged and need not be shown. However, you may consider the motive or lack of motive as a circumstance in this case. Presence of motive may be evidence of guilt. [65] Absence of motive may suggest innocence. You should give the presence or absence of motive, as the case may be, the weight you believe it deserves.

Now, you will recall that a third theory of murder asserted in this case by the State is the so-called depraved heart murder. Under this theory, murder is the killing of another person while acting with an extreme disregard for human life. In order to convict the defendant of murder on this theory, the State must prove, one, that the conduct of the defendant or of someone whom the defendant know-

ingly and wilfully aided and abetted caused the death of Mr. Williams, two, that the defendant's conduct or the conduct of someone who the defendant knowingly and wilfully aided and abetted created a very high degree of risk to the life of Mr. Williams, and, three, that the defendant or someone whom the defendant knowingly and wilfully aided and abetted was conscious of such risk and despite the risk acted with extreme disregard of the life endangering consequences.

Involuntary manslaughter is a lesser included offense as to this third so-called [66] depraved heart theory of murder. Involuntary manslaughter may be proved in one or both of two ways, a killing caused by a grossly negligent act or a killing caused by an unlawful act.

In order to convict the defendant of involuntary manslaughter on the basis of a grossly negligent act, the State must prove, one, that the conduct of the defendant or someone whom the defendant knowingly and wilfully aided and abetted caused the death of Mr. Williams, and, two, that the defendant or someone whom the defendant knowingly and wilfully aided and abetted, conscious of the risk, acted in a grossly negligent manner. That is, in a manner that created a high degree of risk to the life of Mr. Williams.

In order to convict the defendant of involuntary manslaughter on the basis of an unlawful act, the State must prove, one, that the defendant or another participating in the crime with the defendant committed an unlawful act, namely, battery as I will define that term, two, that a defendant or another participating in the crime killed Mr. Williams, and, three, that the act or acts resulting in the death of Mr. Williams [67] occurred during the commission of or as a direct result of the battery.

The defendants are charged with the crime of battery. Battery is committed where a defendant causes an unconsented to offensive physical contact or the infliction of physical harm on another without the victim's consent and without justification.

In order to convict the defendant of battery, the State must prove, one, that the defendant actually caused offensive physical contact or physical harm to Mr. Williams, two, that the defendant intended to bring about such contact or harm, and, three, that the defendant's actions were not legally justified or consented to by Mr. Williams.

Thus, the defendants are charged with three offenses. It will be your duty to return your verdict in the form of answers to the written questions which are being submitted by the Court. Your answers will constitute your verdict. Each answer is to be written or checked in the space provided after each charge listed on the verdict sheet. It is your duty to answer each of these questions in accordance with the evidence in the [68] case and in accordance with the instructions I have given you.

I will briefly review the verdict sheet with you at this time. There is a separate verdict sheet, ladies and gentlemen, for each of the defendants, Mr. Bell and Mr. Gray, and the verdict sheet is a one page document which lists the three charges that are available for you to consider in this case. They're identical in all respects.

The first charge listed on the verdict sheet is murder and you have the options of guilty or not guilty listed next to that charge. You will reach a unanimous verdict as to that charge and you will find that there is an instruction immediately below that charge listed on the verdict sheet. The instruction is consider charge number two only if your verdict on charge number one is not guilty.

In other words, as I've explained in the instructions, involuntary manslaughter, which is charge number two, is what the law calls a lesser included offense as to the third theory of murder. You will only consider involuntary manslaughter as a lesser included offense if your [69] verdict as to charge number one, murder, is not guilty.

Then you will consider, if appropriate and necessary, the involuntary manslaughter charge, and then after that there's another instruction. Consider charge number three only if your verdict on charge number two is not guilty.

Again, battery, the third listed charge, is a lesser included offense of murder and involuntary manslaughter, and so you will not consider battery unless you find not guilty as to the first two charges.

Once you have reached a unanimous verdict as to all of the charges you need to consider in accordance with my instructions, then your foreperson will sign the sheet and date it and will use the verdict sheet to deliver your verdicts here in open court in response to the questions based on the verdict sheet that will be put to the foreman by Ms. White, our courtroom deputy.

Thus, your verdicts, as I say, must be unanimous. All twelve of you must agree. They must, therefore, represent the considered judgment of each juror. When you go back to the jury room [70] to begin your deliberations, there may well be some disagreement among you as to the weight or significance of the evidence or as to what the ultimate verdicts should be.

That is not at all unusual and it should not concern you. Obviously, deliberation requires that there be a full discussion of any differences among you and you should discuss your differences with an open mind. Although you should make every reasonable effort to reach a verdict, if you cannot ultimately agree with your fellow jurors, regardless of how many may disagree with you, it is your duty to stick to your position.

Consult with one another, express your own views, and listen to the opinions of your fellow jurors. Do not hesitate to re-examine your own view, but do not change your opinion unless you come to believe it is wrong. Never refuse to change your position out of stubbornness or because you are tired of listening to your fellow jurors, but do not surrender your honest beliefs about the weight or effect of evidence because your fellow jurors disagree with you, because you want to get it over with, or for the sole purpose of returning a unanimous verdict. You are the [71] impartial judges of the facts. Your sole interest is

to return just verdicts by applying the law to the facts in accordance with these instructions.

Counsel, please approach.

* * * *

[77] THE COURT: All right, ladies and gentlemen, we will now have the closing argument of counsel. Ms. Saxon will proceed first and then you will hear from defense counsel, and then Ms. Saxon will have a final opportunity in rebuttal argument to address you. Ms. Saxon.

MS. STARKS-SAXON: Thank you, Your. Honor. Ladies and gentlemen, before I begin, on behalf of the State, the family of Stacey Williams, I'd like to thank you for your time and attention. This has taken a little time, but there was a lot involved in this case, a man died. He'll never be back here again and that is why we gave this our best effort in all of the time that we had to prosecute this for you.

I'm glad that you all were able to come everyday since we don't have an alternate. I'm glad that the alternate is here. So with that, I [78] will go on. I will get to come back to you twice since it's my burden. So I'll get to speak to you now. Then both of the defense counsel will get to speak to you, and then I will be able to come back and speak to you one more time.

So in my statement right now I may not cover—in fact, I will not cover everything. I will assure you that I'm not going to rehash everything that you have sat here and heard over the last few days because I don't want to insult your intelligence, but there are some things that I want to highlight for you and that's the purpose of this portion of the trial, okay.

Another thing I want to say, a lot of times when they teach us how to do trials we're taught to develop a theory of the case, some kind of angle, some kind of theme, something of that nature in which to present the case, and usually I can come up with that, but in this case all I can come up with was distress.

I was extremely distressed that a group of men could chase and then brutally beat to death a friend. This is 1994. This occurred November of 1993. I would like to think that at this point in time we wouldn't do those kind of things, but, [79] unfortunately, it goes on and went on in this case.

We heard the word stomped. They stomped him. How could they stomp their friend? How could six of them beat on this boy? He wasn't a big man. He was only about five seven, about a hundred fifty-three pounds. We know at least how big two of the people were and there were four more.

When he tried to get up and get away, Mr. Bell and Tank dragged him another way after he had been beaten. There was no mercy, no compassion, just a beating, not just a beating, but they kicked him about the head and threw him on the head, and then after that had been done, Mr. Bell went and kicked him again.

Was this a man? Was Stacey Williams a man? Was he an animal? Would you treat a dog like that? Would you let somebody treat a dog like that in front of you? No.

MS. GLANCY: Objection.

THE COURT: Overruled.

MS. STARKS-SAXON: And that distresses me, and, yes, he may have had drugs in his system when he got beat up. He may have been a drug [80] addict, but if he had lived past November 10th, we don't know what he might have done. How many of you in this room, including me, have done things that we don't want anybody to know about and but—

MR. AMARAL: Objection as to bringing the jury into it, Judge.

THE COURT: The State will confine its argument to the evidence. Go ahead, Ms. Saxon

MS. STARKS-SAXON: If this young man had lived, there's no telling what he might have done with his life, how he might have turned it around, but we'll never know

because these two young men, in conjunction with Tank and three other men that are still unknown, that are phantoms from some place other than this area, took his life, and the fact that he didn't die right there doesn't change it.

His death was imminent, meaning it was there. When he was taken from there, death was on the way. Death was on the way. It was on the way. He went into seizures at his girlfriend's house. In fact, he was brain dead on the 12th of November, the medical records say, and he died on the 13th. So that's why I tell you this is [81] distress.

In addition, these were his friends. Why didn't somebody say stop? No, they didn't have to.

MS. GLANCY: Objection.

THE COURT: Overruled.

MS. STARKS-SAXON: For example, if someone sees a beating on the street and they're not involved in it like the neighbors, if you notice Detective Pennington didn't issue arrest warrants for everybody on Wildwood Parkway, who was adjoining that area, who might have seen the beating, or even could have seen it. Shay didn't get arrested for watching this and not going over and stopping it because we don't have a duty as citizens to go help someone that is not connected to us.

Now, if his mother had been standing right up there and hadn't helped him, a different story, possibly. If that had been his wife—

MS. GLANCY: Objection.

THE COURT: Overruled.

MS. STARKS-SAXON: —watching a husband being brutalized, or a husband watching his children or his wife being brutalized, a [82] different story, but us people, if we see something going on, we don't have a duty to go and jump into it. If we do, that's wonderful, if we have the heart for it and if we'll willing to take the risk, but if we don't, the law doesn't condemn us for that. But in this case, these young men were not only friends of the victim, they were actively involved in the beating.

MS. GLANCY: Objection.

THE COURT: Overruled.

MS. STARKS-SAXON: And nobody—I have haven't heard anybody say, not even Mr. Bell in his statement, which was self-serving, that somebody said stop, hold up, wait a minute, don't throw him on his head, maybe we can work this out another way. And that's why it's important to prosecute these kind of cases, because when people know the law and the community is not standing behind them if they brutalize and kick a little Stacey Williams, whether he has drugs in his system or not, that the law and the community will not protect them because otherwise, if the law and the community don't step in lawlessness takes over, and this has got to stop.

This happened at ten-thirty in the [83] evening. Wildwood Parkway is a well-lit area with houses and a school. This occurred when people watched who live in that area. There's no evidence that these were vacant houses. We know at least one family was there, Shay's family. We know that they chased this boy through the community and beat him. Mr. Gray knocked Tracey out of the way, and as he was being beaten, he yelled out tell my girl, and one of the defense witnesses told us that. They didn't care because they were intent on kicking the devil out of him because he owed Tank some money and Tank was their boy and they were all part of the same group.

Madame State's Attorney, how does that relate to the charges? Well, let me tell you. I'm not an artist, but I'm just doing this to make a point.

THE COURT: Right there is fine.

MS. STARKS-SAXON: Oh, on this balloon, first. This is second degree murder. The defendant is not charged with first degree murder. First degree murder involves premeditation. We're not alleging that they planned, schemed, and then executed this boy, that they sat down and had a meeting about it and then [84] did it. We're not alleging that, but we're saying that it's second degree murder.

MR. AMARAL: Judge, I'm going to object as to the argument of the elements of the charges. The Court has already presented that in the jury instructions. I don't think it's within the province of the State to get into that.

THE COURT: The objection is overruled. Go ahead, Ms. Saxon.

MS. STARKS-SAXON: Now, second degree murder can be in any of these balloons. You can have an intent to kill. You can have an intent to inflict serious bodily harm, and then you can have depraved heart, meaning here.

Now, included in all of this is the act. We know that Stacey was beaten and we know he died from the beating, and how do we know that? The evidence from the State and defense tells you that he was beaten. Mr. Bell tells you in his statement that he was beaten. The witness, Shay, says there was a beating. The autopsy report tells you that there was a beating and that he died from the beating. So there's no question that that's what caused his death and that he died from it, and there's no question that it's a [85] homicide, meaning it's an unlawful death. He just didn't lay in his bed and die. He didn't get killed in an accident. His life was taken from him. We know that.

What I want to explain to you—and this is Stacey Williams. This represents his life. Intent to kill, and we know that actions were directed towards him, but what was the intention? One theory says, well, if the person did this action with the intent to kill and the person dies from it, he's guilty of second degree murder.

Now, when a person is doing something, they don't yell out, hey, you all I'm doing this with the intent to kill. No, they don't do that. They do the action, but as they do the action, their actions speak, as in actions speak louder than words. So, for example, if you walk into a room, you pick up a gun, you aim it at a critical portion of the person's body, say the upper body or the head and you shoot them, even if you miss, you know that when the person took a dangerous weapon and aimed at the head

and shot, that they intended to kill them, and if they didn't intend to kill them, they at least intended to inflict [86] serious bodily harm, because it was a weapon aimed at the head, okay. That's the way you read the intention.

Now, the intent to inflict serious bodily harm. If a person does something to another person, you can tell by their action what they're doing. For example, if they take a person, lift them up and aim their head towards the ground, they do that more than once, if a group of people go as a group, stomp the person, including kicking him about his upper body and head, you know that even if they thought they didn't have the intent to kill, they at least intended to kick his butt. They intended to hurt that boy. You know that.

And even if you say, well, I'm not sure about that, they acted with a cold blooded heart. They didn't care. They went to beat that boy and they didn't care what they did to him, and either one of these theories, the law says that's enough to elevate this to second degree murder.

Now, the other thing the law says is—you see these are all separate little strings—the law says these all come together as one under the theory of participation.

[87] MR. AMARAL: Objection, Your Honor.

THE COURT: The objection is overruled.

MS. STARKS-SAXON: If you personally do any of this or if you act with the person who did this, you are all guilty as one. So even if conservatively you say, well, I'm not sure what Mr. Bell did and I'm not sure what Kevin did, but everybody agrees, nobody in this room disputes what Tank did, and if those young men were acting with Tank, they, in essence, become little Tanks. They're all deputies of each other, and the fact that Tank may have beat him the worst doesn't excuse their conduct, and, therefore, whatever Tank is guilty of, they're all guilty of.

Another example is, if we went, or a group of people went to rob a bank, somebody stayed at the door, the front door, somebody walks to the back door, somebody

went in with the bag to hold the money, and somebody pulled the gun. Let's say the gun went off. Now, they all planned it. They all planned to share all of the money and get away. The gun goes off and the teller is deed. Who's guilty of the murder?

MR. AMARAL: Judge, I'm going to object. I think we need to approach. I think the [88] State is getting into felony murder instructions which are not part of this case. I would ask for a curative instruction and note my exception.

THE COURT: Well—

MS. GLANCY: I join it.

THE COURT: The exception of the defendants are noted. Ladies and gentlemen of the jury, I have instructed you on the law. My instructions on the law are binding upon you. Ms. Saxon or any attorney is free to argue within the bounds of propriety and to use illustrations to illustrate her point, and that is exactly what she is doing. This case, as you well know, does not involve a bank robbery. It does not involve a firearm. It does not involve a weapon of any kind, but attorneys are free to use illustrations to make the points that they wish to make. You may proceed, Ms. Saxon.

MS. STARKS-SAXON: Let me use another illustration. Again, I'm not an artist. Sheriff, would you help me, please.

You've heard the term posse. You've heard the term mob. If this group of people were angry at Tank, if one of the people in this group was angry at Tank and he got all of his buddies to [89] go to Tank's house late at night, get Tank out bed, drag him to the gallows and Tank pulled the thing and made him drop and he hung, and they all stood by there after they helped drag him out and saying, yea, yea, man, way to go, kill him, they're as guilty as the executioner because they participated.

Now, ladies and gentlemen, that's not a choice you have. That's the law, and all of you agreed to follow the law. Now, I don't care what they say. They can talk till

they're blue in the face. They can talk about Bell didn't do this. Kevin didn't do that. Under the law, if they participated, they aided and abetted, in this case they were all present, the Judge said they have to be present, they were there.

The judge said one eyewitness, if believed is enough. In this case, Tracey—everybody in this case knew one another. Nobody disputes that Tracey and Shay knew everybody at this table but Tank. Nobody says that they had an evil motive for talking about this.

Now, Mr. Amaral tried to say that Shay was a drug dealer. I mean, Shay was a drug addict, and all like that.

[90] MR. AMARAL: Objection, Your Honor.

MS. STARKS-SAXON: But Shay is captain of the tennis team.

THE COURT: The objection is overruled.

MS. STARKS-SAXON: Shay is captain of the tennis team and there's been no evidence introduced to show that that's not true. He came forward. He gave a statement to the detective. He signed the statement. He made an identification.

The other defense, anticipating what Shay was going to say, tried to develop a way to destroy his credibility. Marched an investigator in here who says, hey you all, take my word. I showed up seven months after the incident. I talked to a boy with his grandmother. I go in there with a badge and say talk to me. I write this report. I don't get him to sign it or anything. Don't let him review it, but I want you to take my word that what he told me is different than what he told the Homicide detectives down at Homicide.

If you believe the words of Shay and Tracey, then you've got to convict these two boys of second degree murder. They were all there. [91] They chased them. They beat him. Also, when you look at the autopsy report, Dr. Golle said, who was not involved, on the last page of his opinion. Now, he analyzes the different parts of the body and the different injuries, but he says in his

opinion this thirty year old black male, Stacey Williams, died of head injury which included injuries, plural, of the scalp and brain with secondary swelling. The pattern of injury indicates that Mr. Williams was struck at least twice on the left side of the face/head prior to his falling with the right side of the back of his head striking a hard surface resulting in severe injury to the brain. Investigation of the circumstances of this injury reveals that Mr. Williams was allegedly involved in the altercation during which he was struck, fell, and began having seizure. The manner of death is homicide.

He also says that he believes that it was the combined effect of all of this that killed him. Even the medical examiner that was there said he couldn't isolate one blow and say it was that blow that killed him. It was the combination of the blows.

I will come back to you, ladies and [92] gentlemen, after the defense.

THE COURT: Mr. Amaral.

MR. AMARAL: Thank you, Your Honor. When the trial started, I came up in front of you and I told you that you're going to hear evidence about what happened back on November 10th, 1993, and I told you that you're going to hear evidence about an argument over money between people who are together. The State calls them friends. They're a group, a gang, however you want to describe them. There was an argument over money. You can decide what the argument over the money was all about, okay.

The argument occurred and one person, Mr. Vanlandingham, also known as Tank, one person was the center of the argument, the fight, the conflict with Stacey Williams. That's beyond argument. That's the State's evidence. That's the defense evidence. That's the theory of the detective here.

Tank was the primary person who started the whole thing and I told you that you were going to hear evidence to show that his actions were the most serious actions against Stacey Williams, and you heard that evi-

dence. No one disputes that [93] Tank is the person who lifts this person up, Stacey Williams, and drops him on his head, one, two, three times. Beyond controversy, that happened. Everybody agrees to it.

You've got to decide whether or not the injuries that Stacey Williams received as a result of those blows to his head were what caused his death. You've got to decide that because the medical examiner is not sure. He can't say which injuries caused this person's death. Believe me, the medical examiner who was here, didn't even perform the autopsy, okay. He's just reading the notes of somebody else who did it.

So the best he can tell us is that he's not sure, that it may have been a contribution from all of the injuries. Well, what does that mean? I mean, does that mean if he had an injury on his arm that that may have in some way furthered the ultimate device of Stacey Williams? He died because he was dropped on his head three times in like a wrestling move that you see on television, okay, and, unfortunately, just, as you know, people in society today have become desensitized as to the effects of pointing a gun at somebody and shooting it, that this really does [94] cause an injury that can kill somebody.

People have also become desensitized to what they see on TV in the form of, you know, the wrestling that they see on T.V. because in wrestling, if you've ever had a chance to see it, and no one really wants to admit that they watch it, but you've probably come across it while you're turning the channels, and you have these big guys who are up there performing these orchestrated moves, which although they look like they're going to bring about somebody's death, nobody ever ends up dying as a result of them, right?

I mean, you know, as high as they pick somebody up, as hard as they kick somebody in the head, no one ends up dying as a result of that, and, unfortunately, there's people in society who have seen that and it has become something that sticks in their head. I can do this and nothing really serious is going to happen if I do this, and I don't know whether that was going through Tank's mind

or not when he was doing that, but there is no evidence to show that anybody intended to kill Stacey Williams. There's just no evidence.

[95] In fact, if you look at he facts of the case, all of the evidence points against that. Number one, the State is saying that Stacey is one of their friends. No argument, okay. People don't generally go out and want to kill one of their friends. What was this whole thing over? An argument over money. What was Tank trying to do? He was trying to teach Stacey, don't mess with the money, okay. Don't mess with the money, okay, and the lesson that he had to teach this guy, who was high on cocaine and heroin at the time, okay, words probably weren't going to work, he couldn't sit down with him across a table and say, look, Stacey, we're running a business here and you're taking money and if you do that, the business isn't going to succeed and, you know, it will hurt everybody, so please don't take the money, or whatever else is associated with the money.

I mean, that wasn't how this lesson was going to be taught, and Tank decided that his lesson was going to be to put this person down on his head, and this is how he is going to do it. Now, whether he was doing that because of some kind of macho kick to impress the people that were [96] on the corner of Normandy and Franklin, whether he was trying to impress those people with his ability to do this move, I have no idea, okay, but, you know, there wasn't an an intent to kill Stacey Williams.

There weren't any weapons used. This is somebody that they knew and, furthermore, I mean, if there was an intent to kill him, why didn't he finish the job? You know, why didn't he finish the job and kill him? Certainly, if there is an intention to do it, you finish it. If you don't finish it, it's because you don't intend to do it. I mean, that seems to be pretty clear cut, and, in fact, he wasn't killed when those activities occurred. He died days later.

And, believe me, nobody is trying to down play the tragedy of that person's death. I don't care if he's a drug

addict or not. I mean, it wouldn't matter to me if he was or if he wasn't. He died, and any time somebody's life gets taken away from them whether they're a criminal or not, it's not right. It's just not right, and so it doesn't really matter whose life is being taken. The taking of the life is wrong and no one is saying differently, okay, but what [97] we're talking about is who is responsible for it.

You know what I mean? Who is responsible for it, and who are you, as the jury, going to put responsibility on. And when you think that, I mean you really have to use the common sense that you all have. The evidence that you've heard is going to assist you in making that decision but ultimately you're relying on your common sense to figure out who's really responsible for this, and the State can talk about a theory of participation until tomorrow, okay.

The facts of the case are that there were two separate acts. There were two separate incidents. There was an incident that occurred on Wildwood where Anthony Bell admits he participated by hitting Stacey Williams in the chest once or twice, and he told that to you through the statement that he made to the police, and, you know, the State wants to use this statement to put him on trial.

Well, I'm elling you if the State believes the statement enough to be using it against Anthony Bell in this case, then you have to take the whole statement for what it is.

MS. STARKS-SAXON: Objection, Your [98] Honor.

THE COURT: Overruled.

MR. AMARAL: And the statement says clearly, and, by the way, the notes—remember the notes that I asked Detective Pennington about that he talked about with Anthony Bell before he actually wrote down the statement? The notes are the only place where it specifies that Anthony Bell tells the detective, yea, I hit him, I hit him once or twice in the chest. The State didn't want to put the notes into evidence.

MS. STARKS-SAXON: Objection, Your Honor.

MR. AMARAL: The State didn't—

THE COURT: The objection is overruled.

MR. AMARAL: The State didn't put the notes together with the statement that Anthony Bell made, and you're going to have a chance to see that it's not attached to it, and yet I knew that he had made those statements to Detective Pennington, and I asked Detective Pennington about it and Detective Pennington said he was cooperative. I asked him, did you think he was telling the truth? Yes.

How is it a self-serving statement, as [99] the State tried to describe it? How is it a self-serving statement when he's admitting that he hit the guy? I mean a self-serving statement, the way I understand it, would be if he said I didn't touch the guy? I didn't have nothing to do with it. That's a self-serving statement, because he's saying he's not involved in any way. It's far from that.

He's admitted his involvement. He has never denied his involvement. He told the detective, and through the detective he's told you what his involvement was, and his involvement was that on that Wildwood he hit this guy once or twice in the chest. That's it, and we know from the medical records that there were no injuries to Stacey Williams' chest or sternum or any area around here which contributed to his death. We know that because the doctor's statement is that the death was the result of serious head trauma.

So now we come to Shay Yarberough, and, you know, he testified. You have to believe a person's testimony or disbelieve it. You have to regard a person, look at them and decide whether or not they're credible or not, okay. That's your job. But my question about Shay Yarberough's [100] testimony, if he's such an all American kid, the tennis team captain, I mean, first of all, he's admitted that he is in the neighborhood and talks with these guys all of the time, if they're such bad seeds, why is this squeaky clean Shay Yarberough even associating with them?

And if he's so squeaky clean, why did he have to lie to you about talking to the Police Department before he

talked to Detective Pennington? I mean, what he's trying to hide?

MS. STARKS-SAXON: Objection.

MR. AMARAL: I mean if he's saying—

THE COURT: Overruled.

MR. AMARAL: —that the first time that he spoke to the police was when he gave the statement to Detective Pennington, and then he gives different information to the investigator who was called to testify—I mean, does the investigator, who is a state employee, have any motive to lie for these guys?

Come on, he's going to risk his career as a state investigator because he wants to protect these two guys? So you have to decide who you believe. Do you believe the detective, or the investigator rather, who testified, or do you [101] believe Shay Yarberough?

If you don't believe everything that Shay Yarberough said, that's okay. You don't have to believe or disbelieve everything that a person says. You can choose to believe part of what they say and disbelieve other parts of what they say, or if the person comes off as totally unbelievable, you can disregard their entire testimony.

Now, Shay Yarberough couldn't have seen the wrestling moves on Wildwood because they didn't happen there, they happened over here at the corner of Franklin and Normandy. That's where they occurred, and the testimony of Renardo Gardner verifies that, and there wasn't anything said or brought out to dispute Renardo Gardner's testimony. If the State wants to rely and try and harp on the fact that the three questions that Detective Pennington asked didn't elicit the same exact information that Gardner said over there on the stand, well I'm going to ask the State to be held to its own standard.

Did Detective Pennington write these questions out on a piece of paper and let Renardo Gardner read them, and then after reading them, [102] initial it, so, you know, we could make sure that this is exactly what he said and that he wasn't misunderstood. You know, come

on, let's play by the same rules, okay, because if she's going to make that big of a deal out of these statements that the investigator took weren't written down and allowed to be signed and double checked, well then she should be held to the same standard for the information that she's trying to get out of other witnesses. I mean, why should the State have any advantage or be treated any differently?

All we're asking for is a level playing field here. When you talk about involvement in murder, two parts of murder would involve intent and that the State would have to prove an intentional act on the part of Anthony Bell to kill somebody. They're nowhere near that. There's a third prong, a third way of showing this by bringing out that the defendant had an extreme disregard for human life, and when we look at the definition of this, the judge says that you to have look at whether or not the defendant's conduct caused the death. It didn't. So there's one prong shot out of there.

Two, that his conduct created a high [103] degree of risk. Punching him in the chest did not create a high degree of risk, okay. It may have been the criminal act of battery, and that's what we've asserted all along, but it didn't create a high degree of risk that would ultimately allow him to believe that this person was going to die. It didn't.

A third prong that he was conscious of the risk. Even if you're believing a theory of participation here, okay, that whatever Tank did later on down on Normandy and Franklin, that because somebody is involved in the first part of the conflict, which is on Wildwood, that they're all of a sudden going to be held responsible for what somebody else does two and a half blocks away, you have to show that Anthony Bell was conscious that what Tank did was going to cause this very serious problem, this very serious risk. He couldn't have been conscious of it because he wasn't down there. He wasn't down there.

There is no second degree murder theory here that will work. None of them fit into the instructions that the Judge gave you. So move down. You go down to involuntary manslaughter. [104] The Judge told you that's killing by an unlawful act, and that the unlawful act could, in fact, be the battery, okay, but that this act has to be grossly negligent and that the act has to actually cause the death of the victim.

So if you're looking at how this might fit into involuntary manslaughter, how Anthony Bell's conduct may fit into involuntary manslaughter, you have to look at what his act was. What did he do? If he had picked up a gun and shot it at his arm and it started bleeding, an artery that later on brought about his death, obviously, that's an act which could be considered involuntary manslaughter.

If he picked up a weapon or a piece of metal and swung it at his head, obviously, that's a situation where if the person died, it could be involuntary manslaughter.

THE COURT: Five minutes, Mr. Amaral.

MR. AMARAL: Thank you, Your Honor. If you look at what his actions in this whole thing were, striking this person in the chest once or twice, I have put it to you that that does not equal involuntary manslaughter. And the Judge told you, and I'm going to ask you to remember [105] this because this is probably the most important thing I think, that he instructed you on, he said that at the very beginning, what you do in this case is your responsibility. The decisions that you're going to make are your responsibility, not the State's responsibility. It's not mine.

You have to think and use your common sense and make a determination based on the evidence that you've heard as to whether or not the facts allow you to convict Anthony Bell of murder or involuntary manslaughter.

I put it to you this way. There's a place there for battery. You have a place on your verdict sheet for

battery. The judge told you what battery was. An unconsented to offensive contact without the victim's consent.

What does the State have to show? Number one, that Anthony Bell caused this contact. Number two, that Anthony Bell intended to do it. Number three, that his actions were not justified in any way and that it wasn't like a self-defense kind of reaction, okay. The definition for battery is exactly what Anthony Bell did.

I told you that at the beginning of the [106] case. It's what he admitted to back in January. He is guilty of committing a battery against Stacey Williams and nothing else, and he's admitted that to you. He has not tried to say he's not guilty of anything. He has admitted to you that he's guilty of battery. The facts support his being responsible for a battery against Stacey Williams. They support nothing else.

I'm going ask that when you go back to the jury room to deliberate that you think about everything that you've seen in terms of the evidence, but then go back and rely on your common sense. Rely on what's upstairs here when you make this decision, and make the right decision. He's guilty of battery. He's not guilty of murder. He's not guilty of involuntary manslaughter.

THE COURT: Ms. Glancy.

MS. GLANCY: Ladies and gentlemen, I thank you for your kind attention that you have given in this case. Kevin Gray is not a murderer. He didn't batter anybody. He didn't beat anybody. He didn't pummel anybody. He didn't DDT anybody, whatever that means, and, ladies and gentlemen, that's what the evidence has [107] always been.

Kevin Gray is a seventeen year old boy. Unfortunately, he wanted to be a big shot. So he was hanging out with a guy named Tank. Need I say more as to where the nickname Tank probably came from, and he's hanging out with the same people Tank hung out with. He was hanging out with Mr. Bell, his cousin. Mr. Bell

is a little older than Kevin. He had just turned seventeen when he got charged with this murder.

He wanted to be a big shot. He wanted to hang out with the boys, and, ladies and gentlemen, that's probably what was going on in Shay Yarberough's mind, also. He wanted to be one of the boys, but he wasn't, and he didn't have a cousin that was one of the boys. So he wasn't in with the boys.

Now, what Mr. Amaral said to you about a level playing field I'm going to say a little bit about, and I'm going to try not to rehash what the State's Attorney and Mr. Amaral already said and what the Judge has instructed you.

The instructions you've received on the law apply to both men. You have to decide their cases separately. However, the law is the same. [108] Now, to quote a real estate agent, there are three important things in real estate, location, location, and location, and, ladies and gentlemen, here the State couldn't even prove location.

Mr. Gray was charged with a murder in the 500 block of North Louden on November 10th. The State's Attorney presented all of this evidence on Wildwood, and if you don't think where it happened was important, ask yourself why the Judge has given an instruction as to what alibi means. If you're not at the place where a crime took place, you're not guilty of that crime.

And just like Shay Yarberough isn't charged with certain things, Kevin is not charged with anything conceivable that he may be guilty of, if you are to believe he's guilty of anything. The State makes their election.

The State's Attorney told you that she was taught in school you should have a theory of prosecution. Ladies and gentlemen, the State's Attorney doesn't have enough confidence in her case to pick a theory of second degree murder. She's giving you three hoping one of them sticks. That's absurd.

The State's Attorney told you how sick [109] this scenario made her and how distressed it made her. Well,

ladies and gentlemen, this case has distressed me, too. To sit next to a seventeen year old boy who is naive enough to believe the truth will set him free, as long as he gets up and he tells you the truth, nothing can possibly happen, but, ladies and gentlemen, that is not reality. People get found guilty of things they didn't do, and if you don't believe that, ask Kirk Bloodsworth.

He told you just what he told the police. He told this detective, man, I didn't have anything to do with it, and the State tries to put a twist on it like, oh, oh, he said he wasn't present. You'll get that statement. The State introduced it. The statement went, man, and I'm adding the man part, man, I wasn't present with Duke and with Tank. I was on the phone.

Now, if this young man wanted to make up a story after being left in an interview room for a couple of hours, don't you think he would have come up with something a little bit better, a little bit juicier, like, hey, I wasn't there at all. I wasn't anywhere in the vicinity. Go ask my girl, she'll tell you. But, no, what he said [110] was, I was on the phone.

I asked Kevin, did the detective ask you any other questions after that? He said no. Well, this is a detective. He investigates. Why didn't he ask who were you on the phone with, what's her number, I'll go check it out, I don't believe you.

Now, you saw if that wasn't an accurate statement, you saw the State's Attorney recall the detective after Mr. Amaral and I were done putting on evidence that we did not have to put on. It's the State's burden from start to finish, and just as it is their burden, they decide what they want to put in and what they don't.

And isn't it interesting that the detective told you the information received in the beginning was Tank and another individual beat up Stacey. Mr. Bell told you, he's being honest here, yea, I helped a little, I punched. Does that rise up to the level of intending to kill some-

body? Well, you already heard from Mr. Amaral. That's not it, but where does Kevin fit in?

Now, some months later Shay Yarberough, after being told, yea, man, we know you know more, [111] we know you were there, we know you're not telling us everything. Well, then he starts to twitch. Then he says, hey, man, yea, yea, okay, okay, now I know everything. This is how it all went down, and the State's Attorney made a big point of telling you his momma didn't want him in here. Now, who cares? Well, I bet Shay did, and why wouldn't his momma want him in here? Because maybe she knows from grandmom—

MS. STARKS-SAXON: Objection, Your Honor.

THE COURT: Confine your argument to the facts.

MS. GLANCY: The evidence is grandmother was there when Mr. Schatz talked to this boy. Mr. Schatz is not going to risk a conviction for impersonating a police officer. The State's Attorney says, you told him you were a police officer. No, ma'am, I showed him my badge. I gave him my business card. You didn't tell him that he didn't have to talk to you, did you? Yes, I did. And where in this statement does it say that he ever told you this? Well, I think he said line fifty-three, page thirteen.

Mr. Schatz is a professional. Now, you [112] didn't see us trying to slam and bang the detective here and say, oh, he's, you know, running around impersonating somebody. He's doing his job. Mr. Schatz is doing his job and, ladies and gentlemen, the Judge told you somethink very, very important about participation.

There has to be a willful intent to facilitate, to participate. The State's Attorney, I was wondering if she would ever get around to that element because she kept talking about if you're there, if you're there, why didn't you stop this fight. Well, for goodness sake we're talking about a seventen year old and he's supposed to jump in the middle of a fight between a thirty year old man and someone named Tank? He didn't want to get his head beaten in. Does that make him a criminal? He had no duty.

I was surprised with the State's Attorney telling you that if Tank's momma had been out there, or if Stacey's momma had been out there, it would have been a different story. Ladies and gentlemen, there's no general obligation because you're related. If you see a small child that's your child being abused—

MS. STARKS-SAXON: Objection, Your [113] Honor.

THE COURT: Overruled. Go ahead.

MS. GLANCY: —that is different, because you have a legal duty to that child. Kevin had no legal duty. His girl came in here. You could see she was nervous, but did she twitch? Did she flounder? The State's Attorney goes, well, when you talked to us you weren't sure what the time was, but now you're saying between nine and eleven. Ladies and gentlemen, that's a distinction without a difference. You say I'm not sure what time it is, but I know it was between nine and eleven. You're not stating an exact time.

There's something else that was interesting that the State brought up on cross examination. Well, didn't Kevin tell you that nobody got injured, and she said, yea, that's what he had told me. Well, that makes sense. That's what he said that night because by all of the testimony, all of the medical records, Stacey got up. He walked home. There was no bleeding, no big cuts. You're going to get the autopsy pictures, which, frankly, do not depict what he looked like after he got into the fight. They [114] show the surgery scar, but what you don't see are these big like, you know, if you skin your knee or something, if you scrape your head on the sidewalk, that's going to show up.

If you bang your head, if you're slammed into the sidewalk, that's going to show up, but there were no visible signs. Stacey walked home. Look at those medical records. It wasn't even for four hours after the fight that it even occurred to anybody, maybe you ought to see if this man got hurt as a result of a fight he was in.

Now, we're not saying that to slander this man, but those are the facts. He didn't have visible signs. He was

treated by a paramedic. He was taken to the hospital. He was under a doctor's care. None of these professionals knew he had been in a fight. He was being treated for an overdose, and we don't tell you that to say he was a bad person or he deserved this, but to tell you, you have to look at the objective facts in this case, and the objective facts are Kevin was on the phone.

Not only did Kevin's witnesses say he was on the phone, Mr. Bell's witness said he was on the phone. You might have noticed I didn't ask [115] him that question. He wasn't my witness. I didn't know what he'd say, but the State's Attorney asked, well, where was Kevin, and, boy, was I happy when I heard him say Kevin was on the phone.

Now, the State's Attorney had her chance. She talked to Chanel. Chanel wasn't trying to hide anything. She is young and naive, too. She honestly believes if you come in and you tell the truth, no harm can come to you. Ladies and gentlemen, I'm asking you to uphold that.

Kevin took the stand. He didn't have to take the stand, and when the State's Attorney was cross examining him, I purposely tried not to get involved because the truth doesn't change. Lies change. Shay Yarberough's story changed. Like my grandmother told me, the truth doesn't change.

Kevin has said since the word jump, I was on the phone. Hey, here it is, I'm not holding back, detective, ask me questions, I'm not even asking for my momma, the heck with asking for a lawyer. This is a seventeen year old.

Now, Shay, let's go back to Shay again. Why might Shay have talked up all of these different things? Well, you know, it's a little [116] more intimidating when you are dragged down to Homicide. You're talking to a detective. Now, he wanted to say, Yo, I only talked to one detective and I can't remember specifically the point where it was brought up, but I think it was on the State's Attorney's questioning. Oh, yea, I did talk to

another detective, Detective Pennington about another case.

MS. STARKS-SAXON: Objection, Your Honor.

MS. GLANCY: So ask yourself—

THE COURT: I think you did make a mistake there, Ms. Glancy, but the jury's recollection of the evidence will control its deliberations.

MS. GLANCY: But, you know, it was not disputed at all when Shay talked to Mr. Schatz. He was at home. He was at home with his grandmother. He was in a nice safe environment. He didn't have to talk to anybody. When he's in Homicide, oh, a totally different story. He's in a room. There's him and a cop, no grandmom. That puts a different light on things, and then he says, well, you know that night, me and my mom went over to LeJuan's house. Where's momma to [117] back that up? Maybe that's why momma didn't want him in here because she knows she didn't go over that night.

MS. STARKS-SAXON: Objection, Your Honor.

THE COURT: Confine your argument to the evidence.

MS. GLANCY: You don't have to leave your common sense at the door. You've seen what the evidence is, and, ladies and gentlemen, nobody has shaken, but Kevin has told you what the truth is.

The State's Attorney chose what witnesses she was going to put on. Now, the detective told you when the case was initiated we heard about two people, count them, one, two, Tank, Anthony Bell. Where does Kevin fit in? He does not. The State didn't think that the detective should have to a elaborate on that, okay, whatever.

Why didn't the State's Attorney call the officer that took the initial report? Testimony came out that Shay's name was given by LeJuan Robinson. Why didn't LeJuan ever testify? You pick and choose. You don't want to blow your own [118] case, and I'll tell you, why, why would it be necessary to get someone to sign a statement?

As Mr. Amaral pointed out very well, the State's Attorney wanted to bring up other things, well, didn't

you tell our detective this and there wasn't a signed statement. That's true. There are lots of reasons why you might not sit down and type up a signed statement, but another reason is, if you have no reason to believe the person is going to come in and bold face lie and tell a completely different version of the facts than they told you in the safety and comfort of their own home, that's a pretty good reason why you don't bother getting out your typewriter, getting the guy to come down, getting the guy to sign it.

Five years captain of his tennis team. He's in the seventh grade. You think maybe he's prone to a little bit of free imagination?

THE COURT: Three minutes, Ms. Glancy.

MS. GLANCY: Two hundred pounds, he doesn't get bossed around by anybody. Did he look like a two hundred pounder? Where was he when the detective said he was knocking on the doors all along where this happened? Where was he then? Nowhere. But when he's told, hey, we can put you [119] there after he's picked out pictures of family members. He told you that on the stand. That was not disputed.

Well, that might give you a reason why you want to pull somebody into it who's not related. Nobody wants to get up and fry their own family. It's a lot easier to say bad stuff about somebody that you're not real friends with and he told you he had known Stacey a lot longer.

Another reason might be guilt. The State said, hey, hey, hey, you heard it. You heard it. Stacey said Shay call my girl, call my girl, but Shay didn't call his girl. Shay went inside. Then Shay finds out later Stacey is dead.

Ladies and gentlemen, there's no disputing it is a tragedy that a man died, but don't compound the tragedy by convicting a seventeen year old boy with the murder of a thirty year old man that he did not have any part in whatsoever, and if the State is sick about this case, I can't blame her, but, ladies and gentlemen, I'm scared to death.

I can't stand the thought of not just one, but another life getting cut off now.

[120] This is a seventeen year old boy who laid himself wide open to all of you and said, come on State cross examine me. I saw you beat up on my girlfriend, but I'm still—I want that jury to hear from my mouth, I didn't do this. Ladies and gentlemen, you cannot render any other verdict against Kevin except not guilty.

THE COURT: You have ten minutes, Mrs. Saxon.

MRS. STARKS-SAXON: Thank you, Your Honor. Ladies and gentlemen, I can't address every point because I don't have the time. So I'm going to pick the main ones. This is Stacey. This is the bruise to Stacey's face. Head injuries that go through the scalp. The doctor in the autopsy describes the injuries, but even when you hit somebody in the head, you may not see the injury yourself. He even said like when you hit somebody from the back, it will injury the brain in the front. That's why when you hit somebody in the head it's a tricky place. This is the way he looked when he went to the hospital.

Now, they say, they being the defense, that we just made all of this up. But prior to the defendant getting on the stand was there any [121] evidence whatsoever that any of this had occurred down here? All of the information, all of the investigation indicated the beating occurred over here.

This only came up when the defense put on their case. They put on a cousin of one of the defendants, a good friend of one of the defendants, a girlfriend who didn't see anything. Gardner said he didn't see anything. Montgomery said he didn't—Lamont said he didn't see anything, and Kevin said he wasn't even there.

I suggest to you, ladies and gentlemen, something did start down here because Tracey saw them run past her on Wildwood from that direction. That's why I put her back on to clarify that, and the defendant says in his statement that they chased him. In fact, he told her to get out of the way, and they ran over here. So probably

something happened down here. I don't know exactly what, but they ran from that direction.

None of these people have said that Tracey was lying, and they talk about a level playing field, okay. Let's take Detective Pennington's statement the last time I brought him [122] in. Let's do that. We have a signed statement from Shay.

THE COURT: The statement is not in evidence.

MS. STARKS-SAXON: It's not in, but you saw it. We have a signed statement from him that he gave the detective and we have the report of a man that talked to him several months later. Now, if the defense was so confident that Shay was lying, they could have brought in the police supposedly that he talked to. They brought in Detective Neverdon. The police are not just State's witnesses. They come whenever they're summonsed.

MS. GLANCY: Objection.

THE COURT: The objection is overruled.

MS. STARKS-SAXON: They brought in Detective Neverdon. They could have brought in the first officer. They could have brought in anybody that they wanted.

MR. AMARAL: Objection.

THE COURT: The objection is overruled. As I've instructed the jury, there is no burden on the defense, but the argument is a proper one. Go ahead, Ms. Saxon.

[123] MS. STARKS-SAXON: So let's be clear about what's going on here. I asked Shay face to face if what he said to him was true, and you can evaluate his credibility. Now, if they were so confident that what he said was a lie and that he told the truth, why didn't they bring the grandmother in? She has to respond to a summons just like anybody else.

MS. GLANCY: Objection.

THE COURT: Overruled.

MS. STARKS-SAXON: And, ladies and gentlemen, you just don't rely on the State's witnesses. Mr. Bell, Mr. Bell tells you, an argument broke out between Tank and Stacey in the 500 block of Louden Avenue, somewhere down here. Stacey got smacked and then ran onto Wild-

wood. Me and a few other guys ran after Stacey. Me, and he was identified by Tracey, Kevin was identified by Tracey and Shay as being in the pack, and he was identified and he put himself there.

We caught up to him on Wildwood Parkway. We beat Stacey up. After we beat Stacey up, we walked him back to Louden Avenue and then I walked over and used the phone. Stacey and the others walked down Louden. Now, that is his [124] statement that he signed that you will look at.

So if you don't believe me, if you don't want to believe the witnesses, believe him, because Mr. Amaral wants you to believe that all he did was hit him, and if he wants you, he said, to accept the whole statement, well accept the whole statement.

He used the the word theory. Participation is not a theory. Participation is the law, and he said, he said they were trying to teach him a lesson. Don't mess with money, we're running a business. The lesson they were trying to teach was, by example, if you mess with our money, this is what will happen to you, and they kicked the mess out of that boy. They beat him unmercifully and that was the example to everybody in the group, everybody in the neighborhood, if you mess with our money, this is what will happen to you. That was the lesson.

And if you take somebody—and you noticed in the autopsy and the medical records the injuries were about the head. Now, if this went on for twenty minutes and they stomped and kicked him, where were the injuries inflicted? Of the head. There wasn't anything on the body. He was [125] picked up and thrown on the head, and then after that happened, he went over and kicked him in the head. They were all there. They all participated. You don't have to itemize which blow. It was a combination of blows.

He said why didn't we put the notes in. This is a court of law. Judge Davis makes sure that we all play fairly. We introduced the statement because that's what he

adopted. That's what he said he did, and nobody can argue with that.

Mr. Amaral could have had Detective Pennington introduce his notes. I wouldn't have objected. He didn't move them in.

MS. GLANCY: Objection.

THE COURT: Overruled.

MS. STARKS-SAXON: So it wasn't like we were hiding them. We gave you something that we thought was the best evidence, which was something Mr. Bell signed. If we had introduced the notes, he would have said Mr. Homer Pennington made them up.

Now, he says, how is this self-serving? Self-serving meaning I'm trying to play down, I'm helping myself. The way this is self-serving is [126] he says all I did was hit him. I didn't see anybody drop him on the head. Well, see, if he said, yea, I stood there and as I was beating him, I see Tank pick him up and knock him on the head and then I come over and kick him too. If he said that, that puts him in deeper than he wants to be. So he says, no, I just hit him. That's it. That's how it is self-serving.

Now, ladies and gentlemen, there's something else, just one other thing. He went on talking about everything happened down here, Mr. Amaral, but did you hear him slip when he said Wildwood? I made a note of it. It happened on Wildwood. Something started down here, but it ended up there, and it finished at the hospital.

Now, these are the charges that are on the sheet, and voluntary manslaughter—the reason we don't think this is involuntary manslaughter is because we think of involuntary manslaughter as something that's grossly negligent, like somebody rolling down the street in a car just shooting randomly and killing somebody or somebody driving—

MR. AMARAL: Objection, Your Honor.

MS. STARKS-SAXON: —down the street in [127] a reckless manner.

MR. AMARAL: Objection as to the characterization of that as being involuntary manslaughter.

THE COURT: The objection is overruled.

MS. STARKS-SAXON: Or if you create an unlawful act, let's say you hit somebody, you hit them, and it turns out that they had an egg shell skull. Some people have very delicate skulls, and if you hit them where you might hit another person they wouldn't die and this person would die, that's involuntary manslaughter, and battery, of course, if I hit the stenographer, that's a battery because I intended to do it. That's a battery. If she hit me back, she would batter me.

This, ladies and gentlemen, is not in that class. This was an intentional, vicious act that they all participated in. The reason why I went through all of the theories is I wanted to show you that under all of them or any of them they fit regarding second degree.

THE COURT: You have about one minute.

MS. STARKS-SAXON: Thank you, Judge. Ladies and gentlemen, I just want to finish with [128] this. Mr. Bell gave you a statement that was self-serving. Kevin Gray gave you a statement that was self-serving. Shay didn't have anybody's interest to serve, nor did Tracey, nor did Detective Pennington, and this man died.

I ask you, please, bring back a verdict that reflects what they did because that's what they deserve.

* * * *

[Typewritten Version of Handwritten Redacted Statement, State's Exhibit 5B]

(REDACTED STATEMENT)

This is a statement of Anthony Bell, taken on 1-14-94 at 0925 hrs in the small interview room. Statement taken by Det. Pennington and Det. Ritz.

(Q) Is your name Anthony Bell

(A) Yes

(Q) Are 19 years old and your date of Birth is 6-17-74

(A) Yes

(Q) Can you read and write

(A) Yes

(Q) Are you under the influence of alcohol or drugs

(A) No

(Q) You were explained your Explanation of Rights, do you fully understand them

(A) Yes

(Q) Are you willing to answer questions without an attorney present at this time

(A) Yes

Anthony Bell

[Page -2-]

Bell, Anthony

(Q) Has anyone promised you anything if you answer questions

(A) No

(Q) What can you tell me about the beating of Stacey Williams that occurred on 10 November 1993

(A) An argument broke out between and Stacey in the 500 blk Louden Ave Stacey got smashed and then ran onto Wildwood Parkway. Me , and a few other guys ran after Stacey. We caught up to him on Wildwood Parkway. We beat Stacey up. After we beat Stacey up we walked him back to Loudon Ave I then walked over and used the phone. Stacey and the ohters walked down Loudon

(Q) When Stacey was beaten on Wildwood Parkway, how was he beaten

Anthony Bell

[Page -3-]

Bell, Anthony

(A) Hit, kicked

(Q) Who hit and kicked Stacey

(A) I hit Stacey, he was kicked but I don't know who kicked him

(Q) Who was in the group that beat Stacey

(A) Me, , and a few other guys

(Q) Do you have the other guys names

(A) , and me, I don't remember who was out there

(Q) Did anyone pick Stacey up and drop him to the ground

(A) No when I was there.

(Q) What was the argument over between Stacey and

Anthony Bell

[Page -4-]

Bell, Anthony

(A) Some money that Stacey owed

(Q) How may guys were hitting on Stacey

(A) About six guys

(Q) Do you have a black jacket with Park Heights written on the back

(A) Yeh

(Q) Who else has these jacket.

(A) ,

(Q) After reading this statement would you sign it

(A) Yes

Anthony Bell

Det. William F. Ritz *Det. Homer Pennington*

(UNREDACTED STATEMENT)

This is a statement of Anthony Bell, taken on 1-14-94 at 0925 hrs in the small interview room. Statement taken by Det. Pennington and Det. Ritz.

(Q) Is your name Anthony Bell
(A) Yes

(Q) Are 19 years old and your Date of Birth is 6-17-74
(A) Yes

(Q) Can you read and write
(A) Yes

[redacted]

(Q) Are you under the influence of Alcohol or Drugs
(A) No

(Q) You were explained your Explanation of Rights, Do you fully understand them
(A) Yes

(Q) Are you willing to answer questions without an attorney present at this time.
(A) Yes

[redacted]

Anthony Bell

57

B.11, Anthony

(Q) Has anyone promised you anything if you answer questions

58

(A) No

(Q) What can you tell me about the beating of Stacey Williams that occurred on 16 November 1993

(A) An argument broke out between Tank and Stacey in the South London Ave Stacey got smacked and then ran out. Widwood Parkway. Me Tank, Kevin and a few other guys ran after Stacey. We caught up to him on Widwood Parkway. We beat Stacey up After we beat Stacey up we walked him back to London Ave I then walked away and used the phone. Stacey and the others walked down London

(Q) When Stacey was beaten on Widwood Parkway, How was he beaten

Initials K.

Bell, Anthony

(A) Hit, kicked

(Q) Who hit and kicked Stacey

(A) I hit Stacey, he was kicked but I don't know who kicked him

(Q) Who was in the group that beat Stacey

(A) ME, Tank, Kevin and a few other guys

(Q) Do you know the other guys NAMES

(A) Tank, Kevin and me, I don't Remember who was out there.

(Q) Did anyone pick Stacey up and drop him to the ground

(A) No when I was there.

(Q) What was the argument with between Stacey and Frank

Anthony B.

59

Bell, Anthony

(Q) Some money that Stacey owed Tank

(Q) How many guys were hitting on Stacey

(A) About six guys

(Q) Do you have a black Jacket with Pink Heights written on the back

(A) Yeh

(Q) Who else has these jackets

(A) Tank, Kevin

(Q) After Reading this statement, would you sign it

(A) Yes

x Anthony Bell

Det. William Fogg Det. Howard Leonard

**[Typewritten Version of
Handwritten Unredacted Statement, State's Exhibit 5A]**

(UNREDACTED STATEMENT)

This is a statement of Anthony Bell, taken on 1-14-94 at 0925 hrs in the small interview room. Statement taken by Det. Pennington and Det. Ritz.

(Q) Is your name Anthony Bell

(A) Yes

(Q) Are 19 years old and your date of Birth is 6-17-74

(A) Yes

(Q) Can you read and write

(A) Yes

(Q) Are you under the influence of alcohol or drugs

(A) No

(Q) You were explained your Explanation of Rights, do you fully understand them

(A) Yes

(Q) Are you willing to answer questions without an attorney present at this time

(A) Yes

Anthony Bell

[Page -2-]

Bell, Anthony

(Q) Has anyone promised you anything if you answer questions

(A) No

(Q) What can you tell me about the beating of Stacey Williams that occurred on 10 November 1993

(A) An argument broke out between Tank and Stacey in the 500 blk Louden Ave Stacey got smashed and then ran onto Wildwood Parkway. Me Tank, Kevin and a few other guys ran after Stacey. We caught up to him on Wildwood Parkway. We beat Stacey up. After we beat Stacey up we walked him back to Loudon Ave I then walked over and used the phone. Stacey and the ohters walked down Loudon

(Q) When Stacey was beaten on Wildwood Parkway, how was he beaten

Anthony bell

[Page -3-]

Bell, Anthony

(A) Hit, kicked

(Q) Who hit and kicked Stacey

(A) I hit Stacey, he was kicked but I don't know who kicked him

(Q) Who was in the group that beat Stacey

(A) Me, Tank, Kevin and a few other guys

(Q) Do you have the other guys names

(A) Tank, Kevin and me, I don't remember who was out there

(Q) Did anyone pick Stacey up and drop him to the ground

(A) No when I was there.

(Q) What was the argument over between Stacey and Tank

Anthony Bell

[Page -4-]

Bell, Anthony

(A) Some money that Stacey owed Tank

(Q) How may guys were hitting on Stacey

(A) About six guys

(Q) Do you have a black jacket with Park Heights written on the back

(A) Yeh

(Q) Who else has these jacket.

(A) Tank, Kevin

(Q) After reading this statement would you sign it

(A) Yes

Anthony Bell

Det. William F. Ritz *Det. Homer Pennington*

(REDACTED STATEMENT)

This is a statement of Anthony Bell taken on 1.14.94 at 0915 hrs in the small interview room Statement taken by DA Pennington and Det. Rigg.

(Q) To begin, Anthony Bell
(A) Yes.

(Q) And I see that your date of birth is 1.17.74
(A) Yes.

(Q) Can you read and write.
(A) Yes.

[redacted]

(Q) And you're under the influence of alcohol or drugs
(A) No

(Q) You have certain rights. You understand these rights, do you? Full understanding them
(A) Yes.

(Q) And you're willing to answer questions without an attorney present at this time.
(A) Yes.

Anthony Bell

Form 11/27

65

Bill Arthur.

(Q) Has anyone phoned you with
if you answer questions

(A) No

(Q) What can you tell me about the
beating of Stacey Williams that
occurred on 18 November 1993

(A) An argument broke out between
Lou Sloan and Stacey in the 5th
Lou Sloan and Stacey got smashed and
this was outside Willowood Parkway. Me
and a few other guys Ran
after Stacey. We caught up to him
on Willowood Parkway. We beat Stacey
up After we beat Stacey up we
walked him back to Lou Sloan As I
then walked onto and used the phone.
Stacey and the others walked down
Lou Sloan

(Q) When Stacey was beaten on
Willowood Parkway, How was he beaten

Arthur R

Bill, Anthony

(1) Hit, knocked

(2) Who Hit and knocked Stacey
(3) I hid Stacey, he was knocked
but I did hear who knocked
him

(4) Who was in the gym that
beat Stacey.
(5) Me, , and a few
other guys

(6) Do you know the other guys
names?
(7) , and me I just
Remember who was out there

(8) Did anyone pick Stacey up
and drop him to the ground
(9) no when I was there.

(10) What was the argument with
between Stacey and .

Anthony R.

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Bell Antonia

(H) Jane must that Thomas over

(G) How many cups was Arthur

Thomas

(B) Not six cups

(G) Do you have a black Jacket with

Pink Heights written on the back

(M) Yes

(G) Who else has their jacket

(M)

(G) After reading this statement

you sign it

(A) Yes

Anthony Bell

Det. William F [illegible] Det. Hamilton

IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 244

SEPTEMBER TERM, 1995

KEVIN D. GRAY

v.

STATE OF MARYLAND

FISCHER,
CATCHELL,
HOLLANDER,
JJ.

Opinion by Cathell, J.

Filed: December 4, 1995

Appellant, Kevin D. Gray, was convicted by a jury in the Circuit Court for Baltimore City of involuntary manslaughter. The court committed appellant to the custody of the Commissioner of Correction for a period of ten years, with all but seven years suspended. Appellant presents two issues for our review, which we rephrase as follows:

> 1. Did the trial court err in admitting into evidence the redacted statement of appellant's codefendant that implicated appellant in the crime?

2. Did the trial court abuse its discretion when it substituted an alternate juror for a designated juror during trial?

After a review of the relevant facts and law regarding the first issue, we shall reverse appellant's conviction and remand to the trial court. We do not reach appellant's second issue.

Six young men were involved in the beating death of Stacey Williams on November 10, 1993. Investigation of the incident prompted the authorities to arrest Anthony Bell, who gave a written statement implicating himself, appellant, and Jacquin Vanlandingham (also known as "Tank") in Williams's death.[1] These three individuals were the only ones identified by name as having been involved in the beating.

Appellant and Bell were scheduled to be tried jointly. Prior to trial, appellant moved to sever his case from Bell's, or, in the alternative, to exclude Bell's statement from their joint trial. The court denied appellant's motion to sever and ordered that appellant's and Tank's names be redacted from Bell's statement. Bell declined to testify.

At trial, Tracey Brumfield placed appellant at the scene of the crime. She testified that she saw appellant, Tank, and several others chase Williams down the street. Shay Yarberough actually witnessed the beating. He testified that he saw Tank kick and punch Williams several times and pick Williams up over his head and throw him head first onto the sidewalk three times. He also testified that he saw appellant attempt to pick Williams up over his head and drop him on the sidewalk. Detective Homer Pennington of the Baltimore City Homicide Unit testified that he was assigned to the case and, in the course of his investigation, interviewed Bell. During the

[1] Tank was fatally shot two days after the incident.

interview, Bell, gave a written statement implicating himself, appellant, and Tank in Williams's beating. The State was permitted to read the statement into evidence at trial, but as previously stated, was required to redact the names of appellant and Tank therefrom; the words "deletion" and "deleted" were inserted in place of the redacted names. A copy of the statement was also introduced into evidence and blank white spaces marked the places where the names of appellant and Tank had been redacted. We shall address the actual reading of the statement before the jury, *infra*.

Appellant testified in his defense. He stated that he was talking to his girlfriend on a nearby pay phone at the time of the beating. Several other witnesses were called in appellant's defense. Renardo Bell testified that he saw Tank pick up Williams and throw him down, but he did not see appellant in the group. Lamont Matthews also testified that appellant was not in the group of people that had gathered around and beat Williams; that appellant was at a phone booth about half a block up the street. Chanel Brown, appellant's girlfriend, stated that appellant had called her from a pay phone and that appellant had said that Tank was up the street fighting. The jury found appellant guilty of involuntary manslaughter. He filed this timely appeal from that conviction.

Appellant seeks resolution of a question left unanswered by the United States Supreme Court in *Bruton v. United States*, 391 U.S. 123, 88 S. Ct. 1620 (1968), and *Richardson v. Marsh*, 481 U.S. 200, 107 S. Ct. 1702 (1987): whether the introduction of a nontestifying codefendant's inculpatory statement, which is redacted to exclude the names of all those involved in the crime by using the words "deleted" and "deletion," and the reading of that statement before a jury, violates a defendant's rights under the Confrontation Clause of the Sixth Amendment, even if the jury is instructed to consider the statement only against the codefendant-confessor. We hold

that, under the circumstances of this case, it does not reverse. We explain.

The Confrontation Clause of the Sixth Amendment, made applicable to the States through the Fourteenth Amendment, *Pointer v. Texas*, 380 U.S. 400, 403, 85 S. Ct. 1065, 1068 (1965), guarantees the right of an accused "to be confronted with the witnesses against him." The right of confrontation includes the right of cross-examination. Thus, "where two defendants are tried jointly, the pretrial confession of one cannot be admitted against the other unless the confessing defendant takes the stand." *Richardson*, 481 U.S. at 206, 107 S. Ct. at 1707.

In *Bruton, supra*, Bruton and Evans were charged with armed robbery. Both were convicted after a joint trial, at which a postal inspector, to whom Evans had confessed his involvement and Bruton's complicity, testified thereto. The trial court duly instructed the jury to disregard the confession in determining Bruton's guilt or innocence and to consider it as competent evidence only against Evans. The Supreme Court began its discussion by noting what had been the Court's premise up to that point: that "it [was] 'reasonably possible for the jury to follow' sufficiently clear instructions to disregard [a] confessor's extrajudicial statement that his codefendant participated with him in committing the crime." 391 U.S. at 126, 88 S. Ct. at 1622 (quoting *United States v. Delli Paoli*, 352 U.S. 232, 239, 77 S. Ct. 294, 299 (1957)). The problem with adhering to this principle had earlier been indicated by the dissent in *Delli Paoli*. Justice Frankfurter spoke for the four dissenters:

> [T]oo often such admonition against misuse is intrinsically ineffective in that the effect of such a nonadmissible declaration cannot be wiped from the brains of the jurors . . . and fails of its purpose as a legal protection to defendants against whom such a declaration should not tell. . . . The Government

> should not have the windfall of having the jury be influenced by evidence against a defendant which, as a matter of law, they should not consider but which they cannot put out of their minds.

352 U.S. at 247-48, 77 S. Ct. at 303.

While recognizing the efficacy of joint trials, the *Bruton* Court also acknowledged that the potential for abrogation of a defendant's constitutional right of confrontation was a "hazard" that could not be ignored. 391 U.S. at 137, 88 S. Ct. at 1628 (quoting *Jackson v. Denno*, 378 U.S. 368, 389, 84 S. Ct. 1774, 1787 (1964)). Though the Court suggested the possibility that "viable alternatives" existed to achieve both the benefit of admission of the statement and the protection of a nonconfessor's right of confrontation, it stated that, when a confessor does not take the stand at trial and his confession is introduced into evidence, there is a "substantial risk that the jury, despite instructions to the contrary[will] look[ ] to the incriminating extrajudicial statements" in determining the guilt or innocence of the nonconfessing codefendant, in violation of that defendant's Sixth Amendment right of cross-examination. *Id.* at 126, 88 S. Ct. at 1622; *see also Jackson*, 378 U.S. at 389, 84 St. Ct. at 1787. Limiting instructions were perceived by the Court as not being "an adequate substitute" for a codefendant's constitutional right of cross-examination: "The effect is the same as if there had been no instruction at all." 391 U.S. at 137; 88 S. Ct. at 1628. The *Bruton* Court then held, as we indicated, that, because of the "substantial risk" that the jury would consider an incriminating confession against the confessor's codefendant despite limiting instructions, the confession cannot be admitted in evidence unless the codefendant has the opportunity to cross-examine the confessor.

As stated, *Bruton* acknowledged that which the *Delli Paoli* dissenters had broached, *i.e.*, the possibility that a jury may not follow a curative instruction to disregard

a confession in determining the guilt or innocence of a confessor's codefendant. Indeed, in *Delli Paoli*, the Court had sanctioned the use of limiting instructions. It was not until *Bruton* that the Court fully acknowledged that it was not realistic to assume that juries would follow the instruction once privy to information implicitly or explicitly inculpating the confessor's codefendant. 391 U.S. at 126; 88 S. Ct. at 1622. One approach suggested by the Court, that had been in use in several states, was the practice of deleting, or redacting, any references to the codefendant from the statement being introduced.

This practice was challenged in *Richardson v. Marsh*, *supra*, where the Supreme Court declined to extend *Bruton* and upheld the practice whereby the codefendant's name, as well as her existence, were eliminated and a curative instruction was given at the time the statement was admitted and again when the jury was charged. Over her objection, Clarissa Marsh and one Benjamin Williams were jointly tried on charges of murder, robbery, and assault.[2] At trial, the State successfully introduced a confession the police had elicited from Williams following his arrest. It had been redacted to omit any reference to Marsh—in fact, as read into evidence, it appeared that no one other than Williams and Martin had participated in the crime.[3] At the time that the redacted confession was

[2] A third suspect, Kareem Martin, was a fugitive at the time of the trial.

[3] Williams's redacted confession in its entirety read:

> "On Sunday evening, October the 29th, 1978, at about 6:30 p.m., I was over to my girl friend's house at 237 Moss, Highland Park, when I received a phone call from a friend of mine named Kareem Martin. He said he had been looking for me and James Coleman, who I call Tom. He asked me if I wanted to go on a robbery with him. I said okay. Then he said he'd be by and pick me up. About 15 or 20 minutes later Kareem came by in his black Monte Carlo car. I got in the car and Kareem told me he was going to stick up this crib, told me the place was a numbers house. Kareem said there would be over $5,000 or $10,000 in the place. Kareem said he would have to take them out after the robbery. Kareem had a big silver gun. He gave me a long barrelled [sic] .22 revolver. We then drove over to this house and parked the car across the big street near the house. The plan was that I would wait in the car in front of the house and then I would move the car down across the big street because he didn't want anybody to see the car. Okay, Kareem went up to the house and went inside. A couple of minutes later I moved the car and went up to the house. As I entered, Kareem and this older lady were in the dining room, a little boy and another younger woman were sitting on the couch in the front room. I pulled my pistol and told the younger woman and the little boy to lay on the floor. Kareem took the older lady upstairs. He had a pistol, also. I stayed downstairs with the two people on the floor. After Kareem took the lady upstairs I went upstairs and the lady was laying on the bed in the room to the left as you get up the stairs. The lady had already given us two bags full of money before we ever got upstairs. Kareem had thought she had more money and that's why we had went upstairs. Me and Kareem started searching the rooms but I didn't find any money. I came downstairs and then Kareem came down with the lady. I said, 'Let's go, let's go.' Kareem said no. Kareem then took the two ladies and little boy down the basement and that's when I left to go to the car. I went to the car and got in the back seat. A couple of minutes later Kareem came to the car and said he thinks the girl was still living because she was still moving and he didn't have any more bullets. He asked me how come I didn't go down the basement and I said I wasn't doing no shit like that. He then dropped me back off at my girl's house in Highland Park and I was supposed to get together with him today, get my share of the robbery after he had counted the money. That's all."

Richardson v. Marsh, 481 U.S. 200, 205 n.1, 107 S. Ct. 1702, 1705 n.1 (1987).

admitted, the court instructed the jury not to consider it in any way against Marsh. With the confession redacted, the only evidence that linked Marsh to the crime was: 1) Marsh's own testimony, in which she admitted that she was in the car with Williams and Martin while driving to the victims' house, and 2) Williams's confession

that, while driving to the victims' house, he and Martin discussed their intent to rob and kill the victims. Marsh alleged that *Bruton* was dispositive of her claims; that introduction of Williams's confession violated her constitutional rights under the Confrontation Clause. The Court held that the admission of William's confession with the proper limiting instruction had not impinged upon Marsh's right of confrontation because the confession did not name her as a perpetrator of the crime or indicate that she was in any way involved in it. *Richardson*, 481 U.S. at 211, 107 S. Ct. at 1709. Rather, it was her own testimony, placing her in the same car with Williams and Martin while they discussed their intent to rob and kill the victims, that tied her to the crimes.

The Court explained that, in *Bruton*, it had recognized a "narrow exception" to the general assumption that jurors follow the instructions given to them. Where a confessing codefendant does not take the stand, the Court opined, "the risk that the jury will not . . . follow instructions is so great, and the consequences of failure so vital to the [nonconfessing] defendant" that it would not presume that jurors, under those circumstances, would follow instructions. 481 U.S. at 207, 107 S. Ct. at 1707 (quoting *Bruton*, 391 U.S. at 135, 88 S. Ct. at 1627)). Under the facts presented in *Richardson*, where the references to Marsh were redacted, Williams's confession was only inferentially incriminating—that is, incriminating only when linked with other evidence adduced at trial. In such a circumstance, "the judge's instruction may well be successful in dissuading the jury from entering onto the path of inference in the first place, so that there is no incrimination to forget." *Id.* at 208, 107 S. Ct. at 1708. The same can not be said for confessions that specifically reference a codefendant's complicity in the perpetration of the crime, such as that evinced in *Bruton*. There, Evans's confession directly implicated Bruton as a perpetrator. It was precisely this type of confession that prompted the Court to

carve out its exception: "Specific testimony that 'the defendant helped me commit the crime' is more vivid than inferential incrimination, and hence more difficult to thrust out of mind," the Court opined. 481 U.S. at 208, 107 S. Ct. at 1708. There did not, in *Richardson*, "exist the overwhelming probability of the [jurors'] inability to [disregard the incriminating inference] that is the foundation of Bruton's exception to the general rule." [4] *Id.*

While holding that Marsh had been accorded her constitutional rights, the Court stated, however, that it expressed "no opinion on the admissibility of a confession in which the defendant's name has been replaced with a symbol or neutral pronoun." *Richardson*, 481 U.S. at 211 n.5, 107 S. Ct. at 1709 n.5. Indeed, neither the Supreme Court nor any Maryland appellate court has ever addressed the constitutional ramifications of replacing a defendant's name with a symbol or neutral word in an incriminating statement made by a codefendant.

Surveying other jurisdictions that have faced this issue, we find persuasive the reasoning and analysis employed by the D.C. Court of Appeals in *Smith v. United States*, 561 A.2d 468 (1989), wherein a symbol was used in the place of Smith's name in his codefendant's redacted statement to police. There, Smith and one Harris were tried together on a number of robbery charges. Harris had confessed prior to trial and named Smith as his accomplice. Prior to its admission, Harris's confession was redacted "by 'witing out' all references to Smith and then penciling a rectangular boundary around each remaining blank space." 561 A.2d at 473. Fourteen such rectangular symbols appeared on Harris's two-page confession. In

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[4] The Court then went on to detail the problems inherent in applying the *Bruton* exception to only inferentially inculpatory evidence: "If extended to confessions incriminating by connection, not only is [compliance with *Bruton* by redaction] not possible, but it is not even possible to predict the admissibility of a confession in advance of trial." *Richardson*, 481 U.S. at 209, 107 S. Ct. at 1708.

reviewing its impact upon Smith's Sixth Amendment rights, the D.C. Court of Appeals said:

> [A] properly and effectively redacted statement substituting neutral references for names (including nicknames and the like) and/or descriptions . . . may be admitted into evidence at a joint trial (when coupled with proper limiting instructions) unless a 'substantial risk' exists that the jury will consider that statement in deciding the guilt of the defendant. *In order to determine whether a substantial risk exists, the trial court must consider the degree of inference the jury must make to connect the defendant to the statement and the degree of risk that the jury will make that linkage despite a limiting instruction.* The trial court's assessment as to whether the redaction effectively avoids linkage with the defendant must be made in the context of other evidence admitted at trial.[5]

Id. at 474 (emphasis added; citations and quotations omitted; omission in original). The court then held that, in light of the other evidence adduced at trial, there was a substantial risk that the jury had relied on Harris's confession in determining Smith's guilt; the jury was "virtually invited . . . to use Smith's name to 'fill in the blanks.'" *Id.*

In the case *sub judice*, in moving the trial court to sever appellant's trial from Bell's, appellant defense counsel argued:

> Mr. Bell's statement, in its totality and in various parts, clearly is indicating a group activity in the beating death of Mr. Stacey Williams.
>
> Therefore, it can only be inferred when these two gentlemen are sitting at the same defense table, that

[5] This approach is known as the contextual analysis of *Bruton* questions.

> when [Bell] was implicating . . . himself, that he . . . must have implicated Mr. Gray.
>
> Because we have no right to cross examine Mr. Bell as to his statement, Your Honor, I believe that the entire statement must be excluded, or in the alternative a severance must be granted. I think *Bruton* makes it clear that the reason for the red line type rule announced in *Bruton* was because of the fact that [appellant] would be denied his right to confrontation, and it would be a logical inference drawn by a jury that if one client made a statement concerning a group activity and two people are on trial for that group activity, by implication the statement goes to the detriment of Mr. Gray . . . .

The trial court denied the motion:

> It seems to me . . . that there is not a difficulty here with a statement which involves two people where we redact the name of the defendant who is making the motion, that there's going to be this compelling implication to the jury that the name that's been redacted or left out must be the name of the co-defendant.
>
> To the contrary, I think that where you've got group activity and the evidence here is, apparently, going to be that there were at least five, and maybe as many as six men involved in this assault on the victim, to redact this statement, it seems to me, will not unduly prejudice Mr. Gray.
>
> It seems to me that this statement can be sanitized in about three different spots so as to remove the names of Tank and Mr. Gray and the jury will not be left with the unavoidable inference or implication that the person Mr. Bell is referring to in the statement is Mr. Gray.
>
> . . . .

. . . I just don't see any prejudice befalling Mr. Gray if we can adequately sanitize this statement and take out any indication from Mr. Bell contained in this statement of the identity of anybody else who was involved in the assault. Not just Mr. Gray's name, but we're going to take out all of the names because the evidence is going to be that there were six people involved, and, therefore, to take out all of the names, that will not hurt Mr. Gray, it seems to me.

[APPELLANT'S ATTORNEY]: Well, Your Honor, the jury only has one other person to choose from because there are not five or six people on trial.

THE COURT: Oh, no. Well, I'll instruct the jury that the involvement or alleged involvement, or if the evidence seems to suggest that others are involved, obviously, they're not to consider that the others involved are not on trial. They should not speculate as to why others said to have been involved are not on trial. They are to consider only the evidence against each of the defendants in reaching their verdicts, and, of course, I would instruct the jury that they are not to consider Mr. Bell's statement as evidence against Mr. Gray . . . . But I think that the redaction of the statement together with the instructions will avoid any prejudice to Mr. Gray.

[APPELLANT'S ATTORNEY]: The whole proposition of *Bruton* is that such a limiting instruction will not work in this type of situation.

THE COURT: . . . I made this ruling, of course. In addition to the fact that, according to the State's proffer, there will be eyewitness identification of both defendants as among the six who committed the deadly assault on Mr. Williams.

[APPELLANT'S ATTORNEY]: Yes, but if the witnesses, if they do identify Mr. Bell and Mr. Gray as being among those six individuals, and then add

to that a statement where Mr. Bell states that he was involved in the beating—

THE COURT: It makes the case against Mr. Bell simply stronger than Mr. Gray.

[APPELLANT'S ATTORNEY]: And it makes the case against Mr. Gray stronger.

THE COURT: I don't think so. I don't think so.

[APPELLANT'S ATTORNEY]: Because two people are named, one of them admits, oh, yes, I was involved, that clearly makes the evidence of that one witness appear more believable, and that witness is stating that two people were recognized.

THE COURT: I understand your position. Your motion for severance is denied.

Detective Pennington read Bell's redacted statement to the jury. In pertinent part, that which was read included:[6]

> Question, what can you tell me about the beating of Stacey Williams that occurred on 10, November, 1993?
>
> Answer, an argument broke out between *deletion* and Stacey in the 500 block of Louden Avenue. Stacey got smacked and then ran onto Wildwood Parkway. Me, *deleted*, and a few other guys ran after Stacey. We caught up to him on Wildwood Parkway. We beat Stacey up. After we beat Stacey up, we walked him back to Louden Avenue. I then walked over and used the phone, Stacey and the others walked down Louden.

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[6] Prior to the statement being read into evidence, the court admonished the jury that the statement

> is to be considered . . . as evidence against Mr. Bell only and in no way is . . . [it] to be considered . . . as evidence against Mr. Gray. It is evidence against Mr. Bell only, and . . . you will consider the evidence against each of the defendants individually and reach a separate verdict as to each defendant.

Question, when Stacey was beaten on Wildwood Parkway, how was he beaten?

Answer, hit, kicked.

Question, who hit and kicked Stacey?

Answer, I hit Stacey. He was kicked, but I don't know who kicked him.

Question, who was in the group that beat Stacey?

Answer, me, *deleted, deleted,* and a few other guys.

Question, do you know the other guy's name?

Answer, *deleted, deleted,* and me. I don't remember who was out there.

Question, did anyone pick Stacey up and drop him to the ground?

Answer, no, when I was there.

Question, what was the argument over between Stacey and *deleted*?

Answer, some money that Stacey owed *deleted*.

Question, how many guys were hitting on Stacey?

Answer, about six guys.

Question, do you have a black jacket with Park Heights written on the back?

Answer, yea.

Question, who else has these jackets?

Answer, *deletion*.

Question, after reading this statement, would you sign it?

Answer, yes. He then signed it. [Emphasis added].

In reading the statement to the jury, where the written version indicated "deleted" and "deletion," Detective Pennington spoke the words "deleted" and "deletion."

Evidence otherwise directly implicating appellant in the commission of the crime came from two individuals—Tracey Brumfield and Shay Yarberough. Brumfield, a witness only to the chase, testified that appellant and Tank were among a group of twelve young men chasing Stacey

Williams down the street, approximately ten to twelve feet behind him. She did not recognize the others in the group, getting only a four to five second glance at all of them as they passed approximately six feet in front of her. She admitted that she knew Tank and appellant were friends and were frequently seen together. She did not recognize Bell as one of the men chasing Williams. She stated that she then ran into Yarberough and that the two walked to the house of Williams's girlfriend. Yarberough testified that he witnessed Williams's beating from across the street and could only name Tank, appellant, and Bell as among the six individuals involved in the fray. He then described how Tank and appellant hit Williams and dropped him on his head several times. Bell was also seen hitting Williams. On cross-examination, however, it was revealed that, among other inconsistencies, Yarberough had apparently provided a statement to the police different from his testimony at trial, in which he stated he saw the altercation but did not know the identities of those involved in it.

In determing whether Bell's statement was sufficiently redacted, the trial court had to assess *Bruton's* "substantial risk" criterion in light of the degree of inference the jury would have had to make to connect appellant to Bell's statement and the degree of risk that the jury would have linked the two despite a limiting instruction. *See Smith,* 561 A.2d at 474.

Mere deletion of appellant's (and Tank's) name did not effectively make Bell's statement nonincriminating as to appellant. In the context of other evidence (Brumfield's and Yarberough's testimony), the jury need only have taken a short step in inferring that appellant was one of those involved. Stated otherwise, it did not have to make a substantial inference that appellant was the person neutrally referenced in the redacted statement. Therefore, there existed a "substantial risk" that the jury considered

the statement in deciding appellant's guilt. Indeed, with Tank dead, the jury was "virtually invited . . . to use [appellant]'s name to 'fill in the blanks.'" *Id.* Simply stated, the use of "deleted" or "deletion" was insufficient to protect appellant against "the practical and human limitations of the jury system." *Bruton*, 391 U.S. at 135, 88 S. Ct. at 1627. *See also Greenwell v. United States*, 336 F.2d 962, 969 (D.C. Cir. 1964) (replacing name of defendant with neutral term such as "named person" insufficient redaction since "with other evidence . . . connecting the co-defendants in the commission of the crime, it is difficult to believe that the jury was unable to divine who the 'anonymous nobody' referred to in the confession was"), *cert. denied*, 380 U.S. 923, 85 S. Ct. 921 (1965). Although, as the State argues, there were six perpetrators, any one of which the jury could infer was referred to by the deletions, only three were positively identified—Bell, appellant, and Tank. Appellant's role was clearly demonstrated by Bell's statement, rendering it facially incriminating and constitutionally violative. "To hold that there was not a substantial risk that the[jury] would consider th[e] evidence . . . in considering [a codefendant]'s guilt (limiting instruction or not) would require us to wink at the reality of human behavior of jurors as recognized by the Court in both *Bruton* and *Richardson v. Marsh.*" *Foster v. United States*, 548 A.2d 1370, 1379 (D.C. App. 1988).

Thus, the instant case represents a point on the continuum between *Bruton* and *Richardson* "where one cannot have the requisite degree of assurance that the jury will not improperly consider the evidence in deciding the guilt of the defendant against whom the evidence is not admissible despite a proper limiting instruction." *Foster*, 548 A.2d at 1378. We add further that we distinguish *Richardson v. Marsh* by the manner of redaction employed. In *Richardson*, Marsh's role in the perpetration

of the crime had been totally eliminated. There was no indication that anyone other than Williams and Martin committed the crime. In the instant case, however, appellant's role was disclosed, albeit with references to a neutral person. Bell was not portrayed as solely having assaulted Williams and the jury could reasonably infer that it was appellant whose name had been "deleted."

Given our conclusion that there existed a violation of appellant's constitutional rights, we now subject that violation to further analysis to determine whether it was harmless beyond a reasonable doubt. *See Chapman v. California*, 386 U.S. 18, 22-23, 87 S. Ct. 824, 826-27 (1967) (Not all constitutional errors mandate reversal). Maryland courts employ a harmless error analysis in addressing federal constitutional errors. See *Adam and Green v. State*, 14 Md. App. 135, 144 (1972), *Shedrick and Beckwith v. State*, 10 Md. App. 579, 585 (1970), and *Hamm, Lee, Bailey, and Cole v. State*, 7 Md. App. 474, 484 (1969) in the context of Sixth Amendment *Bruton*-type issues. As set forth in *Chapman*, 386 U.S. at 24, 87 S. Ct. at 828, and restated in *Harrington v. California*, 395 U.S. 250, 254, 89 S. Ct. 1726, 1728 (1969), whether an error is harmless beyond a reasonable doubt "is to be based on an independent 'reading of the record and on what seems . . . to have been the probable impact . . . [of the tainted evidence] on the minds of an average jury.'" *Younie v. State*, 272 Md. 233, 246 (1974) (quoting *Harrington*, 395 U.S. at 254, 89 S. Ct. at 1728) (omissions and brackets in original). In other words, a constitutional error is not considered harmless if there is a reasonable possibility that improperly admitted evidence contributed to the conviction being challenged. *Schneble v. Florida*, 405 U.S. 427, 432, 92 S. Ct. 1056, 1060 (1972). Unless the State can prove that the defendant would undoubtedly have been found guilty in the absence of the allegedly tainted evidence, its use will always be error. *Younie*, 272 Md. at 246-47. If, on the

other hand, the State can show beyond a reasonable doubt that the violation is technical or the evidence cumulative of other overwhelmingly inculpatory evidence, no error will be found. *Id.* at 247.

In *Harrington v. California, supra*, the Supreme Court granted *certiorari* to determine whether admission of the statements of Harrington's codefendants, in violation of *Bruton*, nonetheless was harmless beyond a reasonable doubt, as sanctioned in *Chapman v. California, supra*. In *Harrington*, four men were jointly tried on robbery and murder charges. The respective confessions of Harrington's three codefendants were introduced at trial, tempered by appropriate limiting instructions.[7] Harrington's own testimony, as well as that of the testifying confessor, placed Harrington at the scene of the crime. Though varying, accounts of his possession of a gun and the extent of his participation in the commission of the crime were elicited from other witnesses. The Court began by recognizing *Chapman*'s axioms that no federal constitutional error is harmless unless held to be harmless beyond a reasonable doubt and that not all constitutional errors call for reversal of a petitioner's conviction. 395 U.S. at 251-52, 89 S. Ct. at 1727. The Court concluded that, in that case, harmless error existed despite clear *Bruton* violations, even in spite of the cumulative nature of the nontestifying codefendants' confessions, "[b]ut apart from them," because the other evidence "was so overwhelming." *Id.* at 254, 89 S. Ct. at 1728. The Court further rejected the suggestion that, if the mind of one juror was tainted by the violative confessions, reversal was mandated. Its judgment, the Court opined, "must be based on our own reading of the record and on what seems to us to have been the probable impact of the two confessions on the minds of an average jury." *Id.*

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[7] One of the confessors took the stand and, thus, was subject to defense counsels' cross-examination.

In the case *sub judice*, we are not persuaded by the State's assertion that the testimony of Brumfield and Yarberough, in addition to that of the medical examiner,[8] were "substantial evidence" of appellant's guilt so as to render a *Bruton* violation, if any, harmless beyond a reasonable doubt. In view of the conflicting evidence of appellant's presence *vel non* at the scene, the jury may well have considered Bell's statement to have enabled the State to overcome its burden of proof beyond a reasonable doubt. If so, it may have resulted in appellant's conviction. Simply because other evidence tends to inculpate a defendant does not render the use of a codefendant's statement, admitted in violation of *Bruton*, harmless beyond a reasonable doubt. Indeed, the testimony of the witnesses on which the State relies may not have been compelling at all in the minds of the jurors. Brumfield was not herself a witness to the altercation that resulted in Williams's death and Yarberough's allegedly differing statements could have adversely affected his credibility. Bell's statement "might well have tipped the balance in the jurors' minds in favor of conviction." *Harrington*, 395 U.S. at 257, 89 S. Ct. at 1730 (Brennan, J., dissenting). We are unable to hold that the use of Bell's statement, which we have determined violated appellant's right to confrontation, did not result in appellant's conviction.

Thus, we hold that the statement was ineffectively redacted and its use at the joint trial deprived appellant of his right of confrontation. We further hold that it was not harmless beyond a reasonable doubt. Accordingly, we reverse and remand for a new trial.

JUDGMENT REVERSED; COSTS TO BE PAID BY THE MAYOR AND CITY COUNCIL OF BALTIMORE.

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[8] The medical examiner testified that Williams died as a result of trauma to his head, such as caused by being struck on a hard surface.

IN THE COURT OF APPEALS OF MARYLAND

No. 15

September Term, 1996

STATE OF MARYLAND

v.

KEVIN D. GRAY

BELL, C.J.
ELDRIDGE
RODOWSKY
CHASANOW
KARWACKI
RAKER
MURPHY, ROBERT C.
(retired, specially assigned)
JJ.

Opinion by Karwacki, J.
Bell, C.J. & Eldridge, J., dissent

Filed: January 15, 1997

The issue presented in this case is whether the introduction of a nontestifying codefendant's confession implicating a defendant and others, which is redacted to exclude the names of all those involved in the crime, other than the confessor, by using the words "deleted" and

"deletion," violates a defendant's rights under the Confrontation Clause of the Sixth Amendment to the United States Constitution, even if the jury is instructed to consider the confession only against the codefendant-confessor? We shall hold that under the circumstances in this case it does not and reverse the judgment of the Court of Special Appeals.

I.

Stacey Wiliams was beaten on November 10, 1993, by a group of six young men. Within a few hours, Williams died from his injuries. Following a preliminary investigation, the police arrested Anthony Bell. In a written statement to police, Bell implicated himself, Jacquin Vanlandingham, and Kevin Domonic Gray, the Petitioner, as participants in the beating. Vanlandingham was fatally shot two days after Williams' death, and Gray was arrested one day later. These three individuals were the only ones identified by name in Bell's statement to police as those involved in the murder, although evidence adduced at trial suggested that as many as six persons participated in the attack on Williams.

Bell and Gray were scheduled to be tried jointly in the Circuit Court for Baltimore City. Prior to trial, however, Gray moved to sever his trial from Bell's, or alternatively to exclude his confession from evidence. The trial court denied both motions but ordered the redaction of Gray and Vanlandingham's names from Bell's confession.

At trial, the State presented the testimony of Tracy Brumfield, Shay Yarberough, and Baltimore Homicide Detective Homer Pennington. Brumfield testified that she saw Gray, Vanlandingham, and several others chase Williams down the street. Yarberough, the only witness to Williams' beating, testified that he saw Vanlandingham lift Williams over his head and drop him on the sidewalk.

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[7] We do not mean, nor is there any evidence in the record, to suggest that Vanlandingham and Williams' murders are related.

Yarberough also testified that Gray attempted the same maneuver, albeit less successfully, and along with the other five members of the group, including Bell, repeatedly kicked Williams about the ribs, neck, and head.

Detective Pennington testified that his investigation led him to arrest and interview Bell. In the course of that interview, Bell formally confessed to participating in the beating of Williams, implicating both Gray and Vanlandingham in the process.

The State was permitted to read Bell's confession into evidence over his objection, but, as indicated, *supra*, was concomitantly required to redact the names of Gray and Vanlandingham, and insert in their place, the words "deletion" or "deleted." A copy of the redacted confession was admitted into evidence with blank white spaces indicating where the names of Gray and Vanlandingham had been.

Unlike Bell, Gray testified in his own defense, claiming that he was speaking with his girlfriend on a public telephone when the fray ensued. Chanel Brown, Gray's girlfriend, testified that he had called her from a telephone booth and, during that conversation, said that Vanlandingham was fighting. Defense witness Lamont Mathews testified that although he had witnessed Williams' beating, he placed Gray at a telephone booth "up the street" during the melee. The jury nonetheless convicted Gray of involuntary manslaughter, for which he was sentenced to ten years imprisonment with all but seven years suspended.

Gray appealed that judgment to the Court of Special Appeals, claiming that the introduction of Bell's redacted confession violated his Sixth Amendment right to confrontation, and was contrary to the holding in *Bruton v. United States*, 391 U.S. 123, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968). The intermediate appellate court agreed and reversed Gray's conviction. *Gray v. State*, 107 Md. App. 311, 667 A.2d 983 (1995). We granted the State's Petition for a Writ of Certiorari.

II.

In the trial of every criminal case, state or federal, a defendant has the right "to be confronted with witnesses against him." U.S. Const. amend. VI; *Pointer v. Texas*, 380 U.S. 400, 403, 85 S. Ct. 1065, 1068, 13 L. Ed. 2d 923, 926 (1965) (Sixth Amendment made applicable to states through Fourteenth Amendment); *Smallwood v. State*, 320 Md. 300, 306, 577 A.2d 356, 359 (1990); *Harris v. State*, 306 Md. 344, 361, 509 A.2d 10, 128 (1986). Implicit in this principle is the right to cross-examine those witnesses. *Pointer*, 380 U.S. at 406-07, 88 S. Ct. at 1069-70, 13 L. Ed. 2d at 928; *Smallwood*, 320 Md. at 306, 577 A.2d at 359.

In *Bruton v. United States, supra*, the United States Supreme Court held that the admission of a nontestifying codefendant's pretrial confession implicating another codefendant by name, violated that defendant's Sixth Amendment confrontation right, notwithstanding an instruction to the jury to disregard the confession in determining the nonconfessing defendant's guilt.[8] Bruton was tried and convicted along with one Evans, who, during the preceding investigation, orally confessed to a postal inspector that he and Bruton perpetrated an armed postal robbery. The postal inspector subsequently testified to Evans' confession. The trial judge duly instructed the jury that the confession was competent evidence against Evans only and was not to be used in assessing Bruton's innocence or guilt. The Supreme Court nevertheless reversed Bruton's conviction.

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[8] The "*Bruton* Rule" was extended to state court proceedings in *Roberts v. Russell*, 392 U.S. 293, 88 S. Ct. 1921, 20 L. Ed.2d 1100 (1968).

[9] The relevant portion of the judge's instruction advised the jurors that:

> "A confession made outside of court by one defendant may not be considered as evidence against the other defendant, who was not present and in no way a party to the confession. Therefore, if you find that a confession was in fact voluntary

In so doing, the Court repudiated its previous position that " 'it is reasonably possible for the jury to follow' sufficiently clear instructions to disregard the confessor's extrajudicial statement that his codefendant participated with him committing the crime." *Bruton*, 391 U.S. at 126, 88 S. Ct. at 1622, 20 L. Ed. 2d at 479 (quoting *Delli Paoli v. United States*, 352 U.S. 232, 239, 77 S. Ct. 294, 299, 1 L. Ed. 2d 278, 284 (1957)). The reason for the departure, articulated initially by the *Delli Paoli* dissent, was that:

> "too often such admonition against misuse [of a co-defendant's confession] is intrinsically ineffective in that the effect of such a nonadmissible declaration cannot be wiped from the brains of the jurors. The admonition therefore becomes a futile collection of words and fails of its purpose as a legal protection to defendants . . . . The Government should not have the windfall of the jury being influenced by evidence against a defendant which, as a matter of law, they should not consider but which they cannot put out of their minds.

352 U.S. at 247-48, 77 S. Ct. at 302, 1 L. Ed. 2d at 288 (Frankfurter, J., dissenting).

The Court acknowledged three arguments supporting the use of limiting instructions in this area, namely the probative value of the confession, judicial economy, and the integrity of the jury system itself, but categorically rejected the first two. While the confession may be the best evidence of the confessor's guilt, alternative ways exist to allow the State the benefit of the confession without infringing upon the nonconfessing defendant's constitutional rights. *Bruton*, 391 U.S. at 133-34, 88 S. Ct. at

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and intentionally made by the defendant Evans, you should consider it as evidence in the case against Evans, but you must not consider it, and should disregard it, in considering the evidence in the case against the defendant Bruton.

1626, 20 L. Ed. 2d at 483-84. The use of redactions is but one example. *Id.* at 134 n.10, 88 S. Ct. at 1627 n.10, 20 L. Ed. 2d at 484 n.10.

Similarly, joint trials conserve state resources by avoiding the necessity of duplicate proceedings, reduce inconveniences to witnesses, and accelerate the judicial process. *Id.* at 134, 88 S. Ct. at 1627, 20 L. Ed. 2d at 484. Nevertheless, fundamental constitutional rights, such as the right of confrontation, are seldom sacrificed upon the altar of judicial efficiency. *Id.* at 135, 88 S. Ct. at 1627, 20 L. Ed. 2d at 484.

Turning to the third argument in support of limiting instructions, the Court acknowledged that inadmissible evidence inevitably finds its way before the jury, but that reliance on the jury's ability to perform its role is justified under many circumstances. *Id.*, 88 S. Ct. at 1627, 20 L. Ed. 2d at 484. In those instances, "[i]t is not unreasonable to conclude . . . [that] the jury can and will follow the trial judge's instructions to disregard such information. *Id.*, 88 S. Ct. at 1627, 20 L. Ed. 2d at 484-85. When, however,

> "the powerfully incriminating extrajudicial statements of a codefendant who stands side-by-side with the defendant, are deliberately spread before the jury in a joint trial . . . the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure [are] so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored."

Id. at 135-36, 88 S. Ct. at 1627, 20 L. Ed. 2d at 485. The Court concluded that:

> "despite the concededly clear instructions to the jury to disregard Evans' inadmissible hearsay evidence inculpating [Bruton], in the context of a joint trial, we

cannot accept limiting instructions as an adequate substitute for [Bruton's] constitutional right of cross examination . . . . The effect is the same as if there had been no instruction at all."

Id. at 137, 88 S. Ct. at 1628, 20 L. Ed. 2d at 485-86.

III.

Nineteen years later in *Richardson v. Marsh*, 481 U.S. 200, 107 S. Ct. 1702, 95 L. Ed. 2d 176 (1987), the practice of omitting any references to a defendant from a statement being introduced against a confessing codefendant was challenged a practice initially suggested by the Court itself. *See*, Part II., *supra*. Clariss Marsh, Benjamin Williams and Kareem Martin were charged with assaulting Cynthia Knighton and murdering her son, Koran, and her aunt, Ollie Scott. Over Marsh's objection, Marsh and Williams were tried together.[10] At trial, the state introduced a confession made by Williams shortly after his arrest. The confession had been redacted to omit all references to Marsh. In fact, on its face, the confession implicated no one other than Williams and Martin in the crimes. Williams did not testify. Nevertheless, Marsh was linked to the confession via her own testimony that she was in the vehicle on the way to the crime scene when, by Williams' admission he and Martin discussed their plans to rob and kill the victims, although Marsh claims not to have heard the conversation. Marsh also testified to being in the house during the robbery, but could not explain why she did not attempt to flee or otherwise assist the victims.

During his closing remarks, the prosecutor cautioned the jury not to use Williams' confession as evidence against Marsh. Nevertheless, he linked Marsh to the confession

[10] Kareem Martin was a fugitive at the time of trial.

by suggesting that if Marsh was in the car during Martin and Williams' conversation, she was, by implication, part of the criminal enterprise. Marsh was convicted of two counts of felony murder and one count of assault with intent to commit murder.

Marsh successfully appealed her conviction to the United States Court of Appeals for the Sixth Circuit. 781 F.2d 1201 (1986). In reversing her conviction, that court opined:

> "Sanctioning the admission of an extrajudicial statement in circumstances in which a substantial risk exists that the statement will be used against the defendant not only denies the Sixth Amendment Right to Confrontation, but raises serious due process concerns regarding the validity of the conviction and the fundamental fairness of the trial process. It is no answer to this unfairness to say that the evidence that set the stage was subject to cross-examination . . . [T]he determination of whether there exists a substantial risk that the jury might have [improperly] considered [the confession] 'may require consideration of other evidence.' "

781 F.2d at 1212 (citations omitted). Assuming the existence of such a risk, the Sixth Circuit noted that the only direct evidence [11] suggesting Marsh knew beforehand that the victims would be robbed and executed was Williams' account of his conversation with Martin just prior to the crime. *Id.* at 1210. In view of the lack of other evidence connecting Marsh to the activities of Williams and Martin, the prosecutor's linkage of Marsh to the confession proved "powerfully incriminating" to her with respect to the critical element of intent, *id.* at 1213, thereby violating her

[11] We note that under Maryland law, there is no difference, in terms of evidentiary value, between direct evidence and circumstantial evidence. *See, e.g., Magnum v. State*, 342 Md. 392, 398, 676 A.2d 80, 82 (1995).

Sixth Amendment confrontation right. Noting that other courts of appeals have declined to adopt the "evidentiary linkage" or "contextual implication" approach to the *Bruton* problem, the United States Supreme Court granted certiorari to resolve the conflict. 476 U.S. 1168, 106 S. Ct. 2887, 90 L. Ed. 2d 976 (1986).

The Supreme Court in *Marsh* rejected the Sixth Circuit's analysis and characterized the holding in *Bruton* as "a narrow exception" to the general principle that jurors follow instructions given them.[12] *Marsh*, 481 U.S. at 206-07, 107 S. Ct. at 1707, 95 L. Ed. 2d at 185. The Court premised its holding upon three basic assumptions. First, "where the necessity of . . . linkage [to other evidence] is involved, it is a less valid generalization that the jury will not likely obey the instruction to disregard the evi-

[12] In support of this principle, the Court cited *Francis v. Franklin*, 471 U.S. 307, 324-25 n.9, 105 S.Ct. 1965, 1976 n.9, 85 L. Ed. 2d 344, 359-60 n.9 (1985) (Court presumes that jurors, conscious of the gravity of their task, attend closely the particular language of the trial court's instructions in a criminal case and strive to understand, make sense of, and follow the instructions given them), *Harris v. New York*, 401 U.S. 222, 225-26, 91 S. Ct. 643, 645-46, 28 L. Ed. 2d 1,4-5 (1971) (provided jury is properly instructed, statements obtained in violation of *Miranda* can be used to impeach defendant's credibility, even though inadmissible to prove defendant's guilt), *Marshall v. Longberger*, 459 U.S. 422, 438-39 n.6, 103 S. Ct. 843, 853 n.6, 74 L. Ed. 2d 646, 661-62 n.6 (1983) (crucial assumption underlying the system of trial by jury is that jurors will follow the instructions given them by the trial judge). *Tennessee v. Street*, 471 U.S. 409, 415, 105 S. Ct. 2078, 2082, 85 L. Ed. 2d 425, 431 (1985) (codefendant's confession properly admitted to prove defendant's confession was not coerced), *Watkins v. Sowders*, 449 U.S. 341, 347, 101 S. Ct. 654, 658, 66 L. Ed. 2d 549, 555 (1981) (instruction admonishing jury not to consider improperly admitted eyewitness testimony sufficient to cure error). *Walder v. United States*, 347 U.S. 62, 65-66, 74 S. Ct. 354, 356, 98 L. Ed. 503, 507 (1954) (illegally obtained evidence properly admitted to impeach defendant with appropriate limiting instruction). *Richardson v. Marsh*, 481 U.S. 200, 206-07, 107 S. Ct. 1702, 1707, 95 L. Ed. 2d 176, 185 (1987).

dence." 481 U.S. at 208, 107 S. Ct. at 1708, 95 L. Ed. 2d at 186. Unlike specific testimony directly inculpating the defendant, as was the case in *Bruton*, inferential incrimination can be avoided by discussing the jury from making the inference in the first instance. *Id.*, 107 S. Ct. at 1708, 95 L. Ed. 2d at 186.

Second, the practical effect of the "linkage" or "contextual approach" to the *Bruton* question would place an impossible burden upon trial courts. If limited to *facially* incriminating confessions, *Bruton* compliance could be had by simple redaction. *Id.* at 208-09, 107 S. Ct. at 1708, 95 L. Ed. 2d at 186 (citing *Bruton*, 391 U.S. at 134 n.10, 88 S. Ct. at 1627 n.10, 20 L. Ed. 2d at 484 n.10). Conversely, an anlysis requiring linkage requires both a pretrial and post-trial determination of whether, after viewing all the evidence introduced, the confession is so "powerfully incriminating" that it should either be excluded in the first instance or the defendant granted a new trial. *Id.* at 209, 107 S. Ct. at 1708, 95 L. Ed. 2d at 187. Such a result not only invites defense malfeasance, but consumes large quantities of time and guarantees nothing in the way of certainty. *Id.*, 107 S. Ct. at 1708, 95 L. Ed. 2d at 187.

Finally, although it might be suggested that the simple remedy to the *Bruton* problem is to forego joint trials when the confession of one defendant might conceivably incriminate the other, the efficacy of that remedy is questionable. *Id.*, 107 S. Ct. at 1708, 95 L. Ed. 2d at 187. Not only do joint trials serve an important function in our criminal justice system in terms of efficiency, they protect defendants from the unfair advantage that a later-tried defendant has over his earlier-tried counterpart, and avoid the criticism associated with inconsistent verdicts. *Id.*, 107 S. Ct. at 1708-09, 95 L. Ed. 2d at 187.

[13] The Court also acknowledged that *Bruton* could be complied with by not using codefendant confessions at all, but rejected that suggestion, noting that "confessions are . . . essential to society's

In the end, the Court declined to extend *Bruton's* reach, concluding that "the calculus changes when confessions that do not name the defendant are at issue." *Id.* at 211, 107 S. Ct. at 1709, 95 L. Ed. 2d at 188. Having said that, however, the Court specifically reserved the issue of "the admissibility of a confession in which the defendant's name has been replaced with a symbol or neutral pronoun." *Id.* at 211 n.5, 107 S. Ct. at 1709 n.5, 95 L.2d Ed. at 188 n.5. This, of course, is the issue presently before us.

IV.

There exits a substantial split of authority on the proper approach to the question expressly left open in *Marsh*. Some courts subscribe to the "contextual" or "evidentiary linkage" approach to the *Bruton* problem. Those jurisdictions principally rely upon the notion that when a nontestifying codefendant's confession tends to inculpate a defendant in light of other evidence presented, or to be presented, at trial, thereby creating a "substantial risk" that the jury will improperly use the confession, the defendant's Sixth Amendment confrontation right is denied. *See, e.g., United States v. Van Hemelryck*, 945 F.2d 1493, 1502-03 (11th Cir. 1991); *United States v. Pendegraph*, 791 F.2d 1462, 1465-66 (11th Cir. 1986); *People v. Fletcher*, 13 Cal. 4th 451, 456, 917 P.2d 187, 189 (1996); *Smith v. United States*, 561 A.2d 468, 474 (D.C. 1989); *People v. Cruz*, 121 Ill.2d 321, 330-31, 521 N.E.2d 18, 22-23 (1988); *People v. Kahn*, 200 A.D. 129, 136-37, 613 N.Y.S.2d 198, 203-04 (1994); *State v. Johnson*, 71 N.C. App. 90, 92, 321 S.E.2d 510, 513 (1984).

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compelling interest in finding, convicting, and punishing those who violate the law.'" *Richardson v. Marsh*, 481 U.S. 200, 210, 107 S. Ct. 1702, 1708, 95 L. Ed. 2d 176, 187-88 (1987) (quoting *Moran v. Burbine*, 475 U.S. 412, 426, 106 S. Ct. 1135, 1143, 89 L. Ed. 2d 410, 424 (1986)).

Other jurisdictions, however, employ the "facial implication" doctrine, holding that when the complaining defendant's name is replaced with a neutral pronoun, and the confession does not otherwise, by itself, inculpate that defendant, it is admissible against the confessing codefendant. *See, e.g., United States v. Hoac*, 990 F.2d 1099, 1105 (9th Cir. 1993); *United States v. Williams*, 936 F.2d 698, 700 (2d Cir. 1991); *United States v. Strickland*, 935 F.2d 822, 825-26 (7th Cir. 1991); *United States v. Donohue*, 948 F.2d 438, 444 (8th Cir. 1991); *United States v. Vogt*, 910 F.2d 1184, 1192; (4th Cir. 1990); *United States v. Espinoza-Seanez*, 862 F.2d 526, 535 (5th Cir. 1988); *United States v. Gonzales*, 749 F.2d 1329, 1334 (9th Cir. 1984); *United States v. Belle*, 593 F.2d 487, 493 (3d Cir. 1979); *Hodges v. Rose*, 570 F.2d 643, 646-47 (6th Cir. 1978); *United States v. Dady*, 536 F.2d 675, 677-78 (6th Cir. 1976); *Harris v. State*, 218 Ga. App. 472, 473, 462 S.E.2d 425, 427 (1995); *State v. Craney*, 662 A.2d 899, 903 (Me. 1995); *Commonwealth v. Sanford*, 323 Pa. Super 436, 439-40, 470 A.2d 998, 999-1000 (1984).

At their extremes, neither approach is completely satisfactory. Evidentiary linkage, applied in its most liberal form, completely undermines the long held, and vitally necessary, presumption that juries follow trial court instructions. The approach also has practical administrative difficulties and may harm defendants as much as it may protect them.

Similarly, while the facial implication doctrine has simplistic appeal, redacted confessions with "neutral pronouns may still prove impossible to 'thrust out of mind.'" *People v. Fletcher*, 13 Cal. 4th at 463, 917 P.2d at 195 (quoting *Marsh*, 481 U.S. at 208, 107 S. Ct. at 1707-08, 95 L. Ed. 2d at 186). The possibility certainly exists whereby notwithstanding the substitution of a defendant's name with a neutral pronoun, a jury could reach but one conclusion that the omission is, in fact, the nonconfessing

codefendant.[14] Although one might argue that is so only when linked with other evidence admitted at trial, the inferential step that the jury must take to reach that conclusion may be so small as to be no step at all. In those instances, the act of redaction becomes a mere formalistic exercise devoid of the Constitutional protections undergirding *Bruton*, and the confession's exclusion from evidence is warranted.[15] *See Clark v. Maggio*, 737 F.2d 471, 476 (5th Cir. 1984) (redaction technique must be employed cautiously and carefully to avoid violating the spirit, if not the letter, of *Bruton*).

Despite the State's assertions to the contrary, it does not necesarily follow from *Bruton* or *Marsh* that a confession that does not implicate a nonconfessing codefendant by name, automatically, and without further inquiry, passes Constitutional muster. We reject, in its most pristine form, the facial implication doctrine urged by the State.

We think the better approach is that typified by the holding in *United States v. Pendegraph, supra*, where the United States Court of Appeals for the District of Columbia Circuit held that "a redacted confession may still

[14] *See, e.g., Harrington v. California*, 395 U.S. 250, 89 S. Ct. 1726, 23 L. Ed. 2d 284 (1969) wherein four defendants, one Caucasian and three African-Americans, where tried together. Harrington, the Caucasian, had made statements placing himself at the scene of the crime. The confession of a nontestifying codefendant was introduced against that codefendant. Although the confession did not implicate Harrington by name, it did refer to "the white guy." Under the circumstances, the Court concluded the inculpatory effect was the same as if it had. *See also United States v. Foree*, 43 F.3d 1572, 1578 n.9 (11th Cir. 1995) (jury compelled by other evidence to conclude that defendant was person named in nontestifying codefendant's confession): *People v. Terry*, 2 Cal. 3d 362, 387-88, 466 P.2d 961, 976-77 (1970).

[15] The other option is to grant a severance and try the nonconfessing defendant separately if the state otherwise chooses to introduce the facially incrimnating confession against the confessing defendant.

violate the *Bruton* rule if the statement *compels* a directly inculpating inference" between the redacted confession and the nonconfessing codefendant. 791 F.2d at 1465 (emphasis added) (where the word "individual" was substituted for Pendegraph's name in his codefendant's confession, the jury could infer that Pendegraph was that "individual" if only because there was no other possibility); *see also United States v. Washington*, 952 F.2d 1402, 1407 (D.C. Cir. 1991) (with proper limiting instruction, Confrontation Clause not violated by redacted statement that, when viewed with other evidence, does not create an inevitable association with the nonconfessing defendant).

As we see it, this approach accords with the rationale of *Bruton* as explained and limited by *Marsh*. The substantial risk to which *Bruton* speaks comes not from the incriminatory tendency of a nontestifying codefendant's confession as to another defendant, but from the belief that in certain exceptional circumstances, a jury will not be able to resist the temptation to ignore the trial court's instructions to overlook what has been thrust into their line of sight. Indeed, jurors are strongly presumed to follow trial court instructions. *See* n.6, *supra*. When however, the directly (and undeniably) inculpatory statements of a codefendant are given to the jury's consideration, notwithstanding a limiting instruction to the contrary, the presumption is overcome and a substantial risk therefore exists that the jury will use the confession as evidence against the nonconfessing defendant. *Bruton*, 391 U.S. at 136-37, 107 S. Ct. at 1628, 20 L.Ed.2d at 485. In other words, a *Bruton* violation occurs when jurors are compelled to do, as rational human beings, that which they have been instructed by the trial court they must not link a nonconfessing defendant to a nontestifying codefendant's confession. The compulsion to make the impermissible inference must be compelling, inevitable, and subject to little or no debate. Otherwise, the general and strong presumption that jurors follow

their instructions is not overcome, and the requirements of *Bruton* are therefore satisfied. *See Marsh*, 481 U.S. at 211, 107 S. Ct. at 1709, 176 L. Ed. 2d at 188.

To be sure, some courts have predicated their conclusions that a confession creates a "substantial risk" that the jury will not heed trial court instructions and therefore is "powerfully incriminating" to a defendant based upon the relative strength of the state's case. *See, e.g., United States v. Key*, 725 F.2d 1123, 1126 (7th Cir. 1984); *English v. United States*, 620 F.2d 150, 152 (7th Cir. 1980). That analysis, however, concerns whether the denial of a defendant's confrontation rights was harmless, *see, e.g., Chapman v. California*, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 705 (1967), not whether the denial of those rights occurred in the first place. We agree that

> "[t]he decision on how to '*Brutonize*' a statement, if necessary, must ordinarily be made early in the trial, when the judge is not in an ideal position to assess the strength of the government's case. A judge can decide at the outset, however, whether a codefendant statement is likely to incriminate other defendants in such a way as to create a substantial *risk* that the jury will consider it in deciding on the guilt of those defendants. If the incriminating references ultimately adds little to the government's case, then their exclusion does no harm, and the confrontation rights of the defendants are preserved. We do not read *Bruton* as guaranteeing a right of confrontation only as against testimony that proves to be vital to the prosecution's case.

Hodges v. Rose, supra, 570 F.2d at 647 n.9. It was in this manner that the trial judge in the case *sub judice* ordered the redaction of Bell's confession, but otherwise allowed the State the benefit of its evidentiary value.

V.

As indicated in Part I., *supra*, the State substituted the words "deletion" or "deleted", for the names of Gray and Vanlandingham. Bell's redacted confession, read to the jury and introduced into evidence, provided in pertinent part:

> "Question, what can you tell me about the beating of Stacey Williams that occurred on 10, November, 1993?
>
> Answer, an argument broke out between *deletion* and Stacey in the 500 block of Louden Avenue. Stacey got smacked and then ran into Wildwood Parkway. Me, *deleted*, and a few other guys ran after Stacey. We caught up to him on Wildwood Parkway. We beat Stacey up. After we beat Stacey up, we walked him back to Louden Avenue. I then walked over and used the phone, Stacey and the others walked down Louden.
>
> Question, when Stacey was beaten on Wildwood Parkway, how was he beaten?
>
> Answer, hit, kicked.
>
> Question, who hit and kicked Stacey?
>
> Answer, I hit Stacey. He was kicked, but I don't know who kicked him.
>
> Question, who was in the group that beat Stacey?
>
> Answer, me, *deleted*, *deleted*, and a few other guys. Question, did anyone pick Stacey up and drop him to the ground?
>
> Answer, no, when I was there.
>
> Question, what was the argument over between Stacey and *deleted*?
>
> Answer, some money that Stacey owed *deleted*.

> Question, how many guys were hitting on Stacey?
>
> Answer, about six guys.
>
> Question, do you have a black jacket with Park Heights written on the back?
>
> Answer, yes.
>
> Question, who else has these jackets?
>
> Answer, *deletion*."

Prior to the confession's introduction into evidence, the court cautioned the jury that

> "the statement provided by Mr. Bell is to be considered by you as evidence against Mr. Bell only and in no way is Mr. Bell's statement provided to the detective about which he's about to testify to be considered as evidence against Mr. Gray. It is evidence against Mr. Bell only, and, as I will instruct you later, you will consider the evidence against the defendants individually and reach a separate verdict as to each defendant."

Taking its cue from the District of Columbia Court of Appeals, the intermediate appellate court relied heavily upon *Smith v. United States*, 561 A.2d 468 (D.C. 1989) wherein blank spaces were used in place of Smith's name in his co-defendant's inculpatory, but otherwise redacted, confession. The Court of Appeals for the District of Columbia opined that:

> "In order to determine whether a substantial risk exists [that the jury will improperly use the confession against the non-confessing codefendant], 'the trial court must consider the degree of inference the jury must make to connect the defendant to the statement and the degree of risk that the jury will make that linkage despite a limiting instruction.' The trial court's assessment as to whether the redaction effectively avoids linkage with the defendant must be make in the context of other evidence admitted at trial."

Smith, 561 A.2d at 474 (quoting *Foster v. United States*, 548 A.2d 1370, 1379 (D.C. 1988). Applying that standard, the Court of Special Appeals noted that "mere deletion of [Gray and Vanlandingham's names]" failed to eliminate from Bell's confessijon *Bruton* hazards because the jury "did not have to make a substantial inference that [Gray] was [one of] the person[s] neutrally referenced in the redacted statement." *Gray*, 107 Md. App. at 327, 667 A.2d at 990. In other words, in light of other evidence presented at Gray's trial, "the jury could reasonably infer that it was appellant whose name had been 'deleted.'" 107 Md. App. at 328, 667 A.2d at 991.

While we agree that the jury *could have* reasonably inferred that one of the deleted names belong to Gray, that inference was not compelled. As both the trial court and the intermediate appellate court acknowledged, as many as six individuals participated in the attack on Williams. The Court of Special Appeals, however, pointed out that "only three were positively identified Bell, appellant, and [Vanlandingham]" and concluded that "[Gray]'s role was clearly demonstrated by Bell's confession, rendering it facially incriminating[.]" 107 Md. App. at 327, 667 A.2d at 990. We disagree.

As we have said, a *Bruton* violation occurs when a co-defendant's confession, either facially, or by compelling and inevitable inference, inculpates a nonconfessing defendant. Under those circumstances, there *is* a substantial risk that the jury will not heed the trial court's instructions to disregard the confession as evidence against the non-confessing defendant or defendants.

True, Shay Yarberough implicated the same individuals from the witness stand as did Bell's confession, but Yarberough also testified that at least three other individuals

were involved in the fray, whom he could not (or would not) identify. Other than by inference, the jury had no way of knowing that Yarberough's testimony and Bell's confession paralleled, and the prosecution did not, in any way, suggest such a coincidence.[16] It was that very inference that the trial court instructed the jury that they must not make.

As we indicated, *supra*, that the jury could have reasonably connected Gray to Bell's confession is not sufficient to raise a *Bruton* challenge. Although the jury knew at the time of trial Vanlandingham was dead, the omitted references in Bell's confession could have been any one of at least four other individuals a fact emphasized by the States' Attorney no less than three times during her final summation. The jury was instructed not to use Bell's confession as evidence against Gray, and, in light of the strong presumption that the jury followed those instructions, Gray's Sixth Amendment confrontation right was adequately protected. His unsupported speculation about what the jury might have done if they drew an impermissible inference is simply insufficient to warrant a reversal upon these facts. In short, "there does not exist [in the present case] the overwhelming probability of [the jury's inability to follow trial court instructions] that is the foundation of the *Bruton*[] . . . Rule." *Marsh*, 481 U.S. at 208, 107 S. Ct. at 1707, 95 L. Ed. at 185.

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[16] Although there is no evidence or allegation of misconduct in this case, the *Marsh* Court alluded to the possibility that prosecutorial attempts to undermine a trial court's limiting instruction by encouraging jurors to make impermissible inferences regarding the relationship between a defendant and a nontestifying codefendant's confession may form the basis of a *Bruton* challenge. 481 U.S. at 211, 107 S. Ct. at 1709, 95 L. Ed. 2d at 188. At least two courts have provided relief upon this basis. *See United States v. Sherlock*, 865 F.2d 1069 (9th Cir. 1989); *People v. Cruz*, 521 N.E.2d 18, cert. denied, 488 U.S. 869, 109 S. Ct. 177, 107 L. Ed. 2d 146 (1988).

JUDGMENT OF THE COURT OF SPECIAL APPEALS REVERSED; CASE REMANDED TO THAT COURT WITH DIRECTIONS TO AFFIRM THE JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY. COSTS IN THIS COURT AND IN THE COURT OF SPECIAL APPEALS TO BE PAID BY RESPONDENT.

Bell, C.J., and Eldridge, J., dissenting:

We would affirm the judgment of the Court of Special Appeals for the reasons set forth in Judge Cathell's excellent opinion for that court. *See Gray v. State*, 107 Md. App. 311, 667 A.2d 983 (1995).

SUPREME COURT OF THE UNITED STATES

No. 96-8653

KEVIN D. GRAY,
Petitioner

v.

MARYLAND

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

June 16, 1997

(6)

Supreme Court, U.S.
FILED
AUG 14 1997
CLERK

No. 96-8653

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

KEVIN D. GRAY,

Petitioner,

v.

STATE OF MARYLAND,

Respondent.

On Writ of Certiorari to the Court of Appeals of Maryland

BRIEF FOR PETITIONER

STEPHEN E. HARRIS
Public Defender of Maryland
ARTHUR A. DELANO, JR. *
NANCY S. FORSTER
Assistant Public Defenders
6 St. Paul Street, Suite 1302
Baltimore, Maryland 21202
(410) 767-8556

* Counsel of Record

Counsel for Petitioner

23 PP

QUESTION PRESENTED

Did the introduction at a joint trial of a redacted confession of a nontestifying codefendant deprive Petitioner of his Sixth Amendment right of confrontation?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

No. 96-8653

KEVIN D. GRAY,

Petitioner,

v.

STATE OF MARYLAND,

Respondent.

On Writ of Certiorari to the Court of Appeals of Maryland

BRIEF FOR PETITIONER

OPINION BELOW

The opinion of the Court of Appeals of Maryland is reported, *State v. Gray*, 344 Md. 417, 687 A.2d 660 (1997), and is reproduced in the petition for writ of certiorari. (Cert. Pet. Apx. 1-23).

The opinion of the Court of Special Appeals of Maryland is reported, *Gray v. State*, 107 Md. App. 311, 667 A.2d 983 (1995), and is reproduced in the petition for writ of certiorari. (Cert. Pet. Apx. 24-46).

STATEMENT OF JURISDICTION

The opinion of the Court of Appeals of Maryland affirming the judgment of conviction entered against Petitioner, Kevin D. Gray was filed on January 15, 1997. The petition for writ of certiorari was filed on April 15, 1997 and was granted on June 16, 1997.

Jurisdiction of the Court is invoked pursuant to 28 U.S.C. 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Amendment VI:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

STATEMENT OF FACTS

Petitioner and codefendant Anthony Bell were charged with the murder of Stacey Williams. The State alleged that Williams died as a result of a beating by Petitioner, Anthony Bell, Jacquin Vanlandingham (hereinafter Tank), and several other young men.[1] Bell gave a written statement to the police in which he incriminated himself, Petitioner, and Tank. (J.A. 57) Petitioner gave an exculpatory oral statement to the police.[2]

Petitioner moved to sever his case from that of codefendant Bell on the ground that Bell's statement incriminated him. (J.A. 4) The motion to sever defendants was heard in the Circuit Court for Baltimore City by the Honorable Andre M. Davis. Judge Davis denied the motion to sever on the grounds that Bell's statement could "be sanitized in about three different spots so as

[1] The jury was told that Tank was fatally shot two days after the beating. (T. 99-100, June 22, 1994)

[2] In his statement, Petitioner denied beating Williams. Petitioner told Detective Homer Pennington, Baltimore City Police Department, that he was on the telephone when Williams was beaten. (T. 38, June 22, 1994)

to remove the names of Tank and Mr. Gray and the jury will not be left with the unavoidable inference or implication that the person Mr. Bell is referring to in the statement is Mr. Gray." (J.A. 8)

At trial, Bell's redacted statement was introduced into evidence by Detective Homer Pennington: [3]

> Question, what can you tell me about the beating of Stacey Williams that occurred on 10, November, 1993?
>
> Answer, an argument broke out between deletion and Stacey in the 500 block of Louden Avenue. Stacey got smacked and then ran into Wildwood Parkway. Me, deleted, and a few other guys ran after Stacey. We caught up to him on Wildwood Parkway. We beat Stacey up. After we beat Stacey up, we walked him back to Louden Avenue. I then walked over and used the phone, Stacey and the others walked down Louden.
>
> Question, when Stacey was beaten on Wildwood Parkway, how was he beaten?
>
> Answer, hit, kicked.

[3] The trial judge granted Petitioner a continuing objection to Bell's statement. (T. 22-25, June 22, 1994) Before Bell's statement was introduced into evidence, the trial judge instructed the jury as follows:

> THE COURT: Thank you, Mr. Amaral. Ladies and gentlemen of the jury, you're about to hear evidence concerning the statement provided by Mr. Bell when he was interviewed by the detective. You should understand, and I will remind you later, that this evidence concerning the statement provided by Mr. Bell is to be considered by you as evidence against Mr. Bell only and in no way is Mr. Bell's statement provided to the detective about which he's about to testify to be considered by you as evidence against Mr. Gray. It is evidence against Mr. Bell only, and as I will instruct you later, you will consider the evidence against each of the defendants individually and reach a separate verdict as to each defendant. You may proceed, Ms. Saxon. (J.A. 10)

Question, who hit and kicked Stacey?

Answer, I hit Stacey. He was kicked, but I don't know who kicked him.

Question, who was in the group that beat Stacey?

Answer, me, deleted, deleted, and a few other guys.

Question, do you know the other guy's name?

Answer, deleted, deleted, and me. I don't remember who was out there.

Question, did anyone pick Stacey up and drop him to the ground?

Answer, no, when I was there.

Question, what was the argument over between Stacey and deleted?

Answer, some money that Stacey owed deleted.

Question, how many guys were hitting on Stacey?

Answer, about six guys.

Question, do you have a black jacket with Park Heights written on the back?

Answer, yes.

Question, who else has these jackets?

Answer, deletion.

Question, after reading this statement, would you sign it?

Answer, yes. He then signed it. (J.A. 10-12)[4]

Immediately after Bell's statement was read into evidence, the prosecutor asked the following question:

[4] Bell's redacted confession was admitted into evidence as State's Exhibit 5B (J.A. 65-68). Bell's redacted confession contains blank spaces where the names Kevin and Tank had been removed.

Q All right, now officer, after he gave you that information, you subsequently were able to arrest Mr. Kevin Gray; is that correct?

A That's correct. (J.A. 12)

Two additional witnesses testified for the prosecution. Tracy Brumfield testified that she saw Stacey Williams being chased down the street by Tank, Petitioner, and several other guys. (T. 92, June 21, 1994) Williams looked scared. (T. 96) Shay Yarberough, 15 years old, testified that he saw Williams being beaten. (T. 111, June 21, 1994) Yarberough testified that Tank, Bell, Petitioner and three other guys confronted Williams and asked Williams "where their money at." (T. 112, June 21, 1994). Tank banged Williams in the mouth. (T. 112, June 21, 1994) Tank kicked Williams several times. (T. 112, June 21, 1994) Tank then picked Williams up and "DDT'd him" three times.[5] (T. 113, June 21, 1994) According to Yarberough, Petitioner tried to DDT Williams, but he couldn't get Williams all of the way up in the air, so he just dropped Williams on his head. (T. 113, June 21, 1994). After Tank dropped Williams for the third time, they stomped him again. (T. 114, June 21, 1994). Yarberough described codefendant Bell as the leader of the group. (T. 119, June 21, 1994) Yarberough further testified that the guys in this group wore jackets that said "Park Heights" when it was cold outside. (T. 116, June 21, 1994).

Petitioner denied beating Williams. (T. 6, June 23, 1994) Petitioner testified that he was talking on the phone with his girlfriend at the time of the beating. (T. 7, June 23, 1994) Petitioner called several other witnesses to support his claim that he was not involved in the beating. (T. 174-196, June 22, 1994)

[5] DDT is apparently a World Wrestling Federation term for picking someone up off the ground and then dropping him head first to the mat.

The jury acquitted Petitioner of second degree murder and convicted him of involuntary manslaughter. (T. 2-3, June 24, 1994) Petitioner was subsequently sentenced to ten years imprisonment with all but seven years suspended. (T. 19-20, August 1, 1994)

In reversing Petitioner's conviction, the Court of Special Appeals of Maryland found that under the circumstances of this case "the introduction of a nontestifying codefendant's inculpatory statement, which is redacted to exclude the names of all those involved in the crime by using the words deleted and deletion, and the reading of that statement before a jury, violates a defendant's right under the Confrontation Clause of the Sixth Amendment, even if the jury is instructed to consider the statement only against the codefendant-confessor." (J.A. 71) The Court of Special Appeals reasoned that, in the context of the other evidence at trial, the mere deletion of Petitioner's name and Tank's name did not effectively make Bell's statement nonincriminating as to Petitioner. (J.A. 83) There existed, in other words, a "substantial risk" that the jury considered Bell's statement in deciding Petitioner's guilt. (J.A. 83-84)

In affirming Petitioner's conviction, the Court of Appeals of Maryland, with two judges dissenting,[6] held that the introduction of a nontestifying codefendant's inculpatory statement, which is redacted to exclude the names of all those involved in the crime by using the words "deleted" and "deletion," and the reading of that statement before a jury, does not violate a defendant's rights under the Confrontation Clause of the Sixth Amendment, if the jury is instructed to consider the statement only against the codefendant-confessor and the statement does not "compel" a directly inculpating inference between the redacted confession and the nonconfessing codefendant. (J.A. 100-101) The Court of Appeals went on to explain that "the compulsion to make the impermissible inference must be compelling, inevitable, and subject to little or no debate." (J.A. 101)

[6] The dissenting judges held that "we would affirm the judgment of the Court of Special Appeals for the reasons set forth in Judge Cathell's excellent opinion for that court." (J.A. 108)

SUMMARY OF ARGUMENT

In *Bruton v. United States*, 391 U.S. 123 (1968), the Court held that a defendant is deprived of his Sixth Amendment right of confrontation when a confession of a nontestifying codefendant which incriminates the defendant is introduced at their joint trial, even if the trial court specifically instructs the jury to consider that confession only against the codefendant. The confession in *Bruton* identified the defendant by name.

In *Richardson v. Marsh*, 481 U.S. 200, 211 (1987), the Court held that a defendant is not deprived of his Sixth Amendment right of confrontation by the admission of a nontestifying defendant's confession with a proper limiting instruction when the confession is redacted to eliminate not only the defendant's name, but any reference to his or her existence.

This case presents for resolution the question left unanswered in *Richardson*, 481 U.S., at 211 n.5: whether the introduction of a nontestifying codefendant's inculpatory statement, which is redacted to exclude the names of all those involved in the crime by using "a symbol or neutral pronoun," violates a defendant's rights under the Confrontation Clause of the Sixth Amendment, even if the jury is instructed to consider the statement only against the codefendant-confessor.

Bruton is premised upon the belief that, given the practical and human limitations of the jury system, a jury cannot be relied upon to disregard "powerfully incriminating" evidence even if instructed to do so. The introduction of a confession of a nontestifying codefendant, which has been redacted to exclude the defendant's

name by using blank spaces and the terms "deleted" or "deletion," is "powerfully incriminating." A jury cannot be relied upon to follow an instruction to simply disregard the confession of a nontestifying codefendant which has been redacted in this manner.

A confession, which had been redacted to exclude the name of the defendant by using blank spaces and the terms "deleted" or "deletion," is incriminating on its face. Rather than eliminating any reference to the defendant's existence as in *Richardson*, a confession, which had been redacted to exclude the name of the defendant by using blank spaces and the terms "deleted" or "deletion" draws the jury's attention to the fact that the names of other persons, known to the codefendant, have been purposely omitted. A confession which has been redacted by using blank spaces and the terms "deleted" or "deletion" all but invites the jury to fill in the blanks with the name of the defendant. If a confession, which had been redacted to exclude the name of the defendant by using blank spaces and the terms "deleted" or "deletion," is viewed in the context of the other evidence presented at trial, its admission is even more "powerfully incriminating." The use of blank spaces or the terms "deleted or deletion" in redacted statements is simply insufficient to protect a defendant against "the practical and human limitations of the jury system." *Bruton*, 391 U.S. at 135.

ARGUMENT

THE INTRODUCTION OF A REDACTED STATEMENT OF A NONTESTIFYING CO-DEFENDANT DEPRIVED PETITIONER OF HIS CONSTITUTIONAL RIGHT OF CONFRONTATION UNDER THE SIXTH AMENDMENT

The Confrontation Clause of the Sixth Amendment, made applicable to the States through the Fourteenth Amendment, guarantees the right of an accused in a criminal prosecution "to be confronted with the witnesses against him." The right of an accused to confront the

witnesses against him includes the right of cross-examination. *Pointer v. Texas*, 380 U.S. 400, 404, 406-407 (1965).

A defendant is deprived of his Sixth Amendment right of confrontation when a confession of a nontestifying codefendant which incriminates the defendant is introduced at their joint trial. *Bruton*, 391 U.S., at 126. A defendant is deprived of his right of confrontation even where the court specifically instructs the jury that the codefendant's confession can only be considered as evidence against the codefendant. *Bruton*, 391 U.S., at 137.[7] In repudiating the assumption that "this encroachment on the right to confrontation could be avoided by the instruction to the jury to disregard the inadmissible hearsay evidence," *Id.*, at 128, the Court recognized:

> "[t]here are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored. . . . Such a context is presented here, where the powerfully

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[7] *Bruton* overruled *Delli Paoli v. United States*, 352 U.S. 232 (1957). *Id.*, at 126. In *Delli Paoli*, 352 U.S. at 239, the Court had held that it was "reasonably possible for the jury to follow" sufficiently clear instruction to disregard a codefendant's inculpatory confession. As Justice Brennan observed for the Court in *Bruton*, 391 U.S., at 126, "since *Delli Paoli* was decided this Court has effecitvely repudiated its basic premise." *See, Jackson v. Denno*, 378 U.S. 368 (1964) (jury could not be relied upon to follow instruction to disregard an involuntary confession); *Burgett v. Texas*, 389 U.S. 109, 115 (1967) (jury could not be relied upon to follow instructions to disregard admission of a prior criminal conviction which is constitutionally infirm). *Cf., Tome v. United States*, 513 U.S. 150, 171 (1995) (Breyer, J., dissenting) (jurors unlikely to follow instructions limiting use of prior inconsistent statements); *Krulewitch v. United States*, 336 U.S. 440, 453 (1949) (Jackson, J., dissenting) (the naive assumption that prejudicial effects can be overcome by instructions to the jury . . . all practicing lawyers know to be a fiction).

> incriminating extrajudicial statements of a codefendant, who stands side-by-side with the defendant, are deliberately spread before the jury in a joint trial. Not only are the incriminations devastating to the defendant but their credibility is inevitably suspect, a fact recognized when accomplices do take the stand and the jury is instructed to weigh their testimony carefully given the recognized motivation to shift blame onto others. The unreliability of such evidence is intolerably compounded when the alleged accomplice, as here, does not testify and cannot be tested by cross-examination. It was against such threats to a fair trial that the Confrontation Clause was directed" *Id.*, at 135-136 [8]

A confession of a nontestifying codefendant which incriminates a defendant is generally not admissible at a joint trial because it is so "powerfully incriminating." *Bruton*, 391 U.S. at 135.

Under some circumstances, however, a nontestifying codefendant's *redacted* confession may be admitted at their joint trial.[9] The Confrontation Clause is not violated by

[8] The Court has long noted that the "truthfinding function of the Confrontation Clause is uniquely threatened when an accomplice's confession is sought to be introduced against a criminal defendant without the benefit of cross-examination." *Lee v. Illinois*, 476 U.S. 530, 541 (1986); *Bruton v. United States*, 391 U.S., at 138 (Stewart, J., concurring); *Bruton v. United States*, 391 U.S., at 141 (White, J., dissenting). *See also, Douglas v. Alabama*, 380 U.S. 415, 419 (1965) (conviction reversed because a confession purportedly made by the defendant's accomplice was read to the jury by the prosecutor and the accomplice subsequently invoked his privilege against self-incrimination).

[9] The erroneous admission of a nontestifying codefendant's confession may also be deemed harmless. *Harrington v. California*, 395 U.S. 250, 254 (1969); *Schneble v. Florida*, 405 U.S. 427, 430 (1972). *See also Cruz v. New York*, 481 U.S. 186, 191-193 (1987); *Tennessee v. Street*, 471 U.S. 409 (1985) (defendant's rights under the Confrontation Clause were not violated by introduction of an accomplice's confession for the nonhearsay purpose of rebutting defendant's testimony that his own confession was coercively derived from the accomplice's statement).

the admission of a nontestifying defendant's confession with a proper limiting instruction when "the confession is redacted to eliminate not only the defendant's name, but any reference to his or her existence." *Richardson*, 481 U.S., at 211.[10] A confession which has been redacted to eliminate not only the defendant's name, but any reference to his or her existence, is not "incriminating on its face." *Id.*, 481 U.S., at 208. Where a confession is not incriminating on its face, and becomes so only when linked with other evidence introduced at trial,

> "it is a *less valid generalization* that the jury will not likely obey the instruction to disregard the evidence. Specific testimony that "the defendant helped me commit the crime" is *more vivid* than inferential incrimination, and hence more difficult to thrust out of mind. Moreover, with regard to such an explicit statement the only issue is, plain and simply, whether the jury can possibly be expected to forget it in assessing the defendant's guilt; whereas with regard to inferential incrimination the judge's instruction may well be successful in dissuading the jury from entering onto the path of inference in the first place, so that there is no incrimination to forget. *Id.*, 481 U.S., at 208.[11] (Emphasis added)

A. Codefendant Bell's Redacted Statement Was "Incriminating on its Face."

The introduction of codefendant Bell's confession, which had been redacted to exclude Petitioner's name and the

[10] In *Richardson*, 481 U.S., at 211 n.5, the Court specifically "express[ed] no opinion on the admissibility of a confession in which the defendant's name has been replaced with a symbol or neutral pronoun."

[11] In *Richardson*, 481 U.S., at 211, the Court recognized that the rule "that juries are presumed to follow their instructions is a pragmatic one, rooted less in the absolute certitude that the presumption is true than in the belief that it represents a reasonable practical accommodation of the interests of the state and the defendant and the criminal process."

name of another known accomplice by using blank spaces and the terms "deleted" or "deletion," clearly deprived Petitioner of his Sixth Amendment right of confrontation. Codefendant Bell's redacted confession remained "powerfully incriminating" on its face despite the elimination of Petitioner's name.[12]

The use of blank spaces or the terms "deleted" or "deletion" was an ineffective means of redaction because the use of blank spaces or the terms "deleted" or "deletion" drew the jury's attention to, rather than away from, the fact that the names of other persons, known to co-defendant Bell, had been purposely omitted.[13] The con-

[12] The majority of federal circuits have adopted the "facial implication" doctrine for assessing whether or not a nontestifying codefendant's redacted confession may be introduced at a joint trial. Under this doctrine, the redacted confession must "be viewed in isolation from the other evidence introduced at trial." *United States v. Williams*, 936 F.2d 698 (2d Cir. 1991). If "the confession, when so viewed, does not incriminate the defendant, then it may be admitted with a proper limiting instruction, even though the other evidence in the case indicates that the neutral pronoun is in fact a reference to the defendant." *Id.*, at 700. *See, e.g., United States v. Hoac*, 990 F.2d 1099, 1105 (9th Cir. 1993); *United States v. Strickland*, 935 F.2d 822, 825-26 (7th Cir. 1991), *cert. denied*, 502 U.S. 1036 (1992); *United States v. Donohue*, 948 F.2d 438, 444 (8th Cir. 1991); *United States v. Vogt*, 910 F.2d 1184, 1192 (4th Cir. 1990), *cert. denied*, 498 U.S. 1083 (1991); *United States v. Espinoza-Seanez*, 862 F.2d 526, 535 (5th Cir. 1988); *United States v. Belle*, 593 F.2d 487, 493 (3d Cir. 1979); *Hodges v. Rose*, 570 F.2d 643, 646-47 (6th Cir. 1978), *cert. denied*, 436 U.S. 909 (1978). A number of States have also adopted the "facial implication" standard. *Harris v. State*, 218 Ga. App. 472, 473, 462 S.E.2d 425, 427 (1995); *State v. Craney*, 662 A.2d 899, 903 (Me. 1995); *Commonwealth v. Sanford*, 323 Pa. Super, 436, 439-40, 470 A.2d 998, 999-1000 (1984).

[13] In *Bruton*, 391 U.S., at 129 n.4, the Court cited with approval an opinion by Judge Henry Friendly in *United States v. Bozza*, 365 F.2d 206 (2nd Cir. 1966) in which the U.S. Court of Appeals for the Second Circuit reversed the judgment of a conviction because the trial judge had allowed the prosecutor to read a codefendant's confession to the jury with the word "blank" replacing the defendant's name. In reversing, Judge Friendly wrote that "it is impossible realistically to suppose that when twelve good men and women had Jones' confession in the privacy of the jury room, not one yielded to the nigh irresistible temptation to fill in the blanks with the keys Kuhle had provided and ask himself the intelligent question to what extent Jones' statement supported Kuhle's testimony, or that if anyone did yield, his colleagues effectively persuaded him to dismiss the answers from his mind." *Id.*, at 215. Judge Friendly, writing for the court, then concluded, "there is a point where the credibility as to the efficacy of such [limiting] instructions with respect to a confession implicating codefendants is overstrained, and this point was reached here." *Id.*, at 217.

fession which had been redated by using blank spaces and the terms "deleted" or "deletion" was, in effect, a "a red flag." The use of blank spaces or the terms "deleted" or "deletion" all but invited the jury to fill in the blanks with the names of Petitioner and Tank. *See, United States v. Long*, 900 F.2d 1270, 1280 (8th Cir. 1990). Unlike the redaction in *Richardson*, 481 U.S., at 208, the use of blank spaces and the terms "deleted" or "deletion" in Bell's redacted statement actually pushed the jury "onto the path of" inferential incrimination. *See, e.g., State v. Butler*, 257 Kan. 1110, 916 P.2d 1 (1996) (leaving blank spaces in place of the defendant's name made it obvious that defendant's name had been redacted); *McDonald v. State*, 210 Ga. App. 689, 436 S.E.2d 811, 813 (1993) (Simply removing the name of the co-defendants and inserting in lieu thereof a "blank" was not sufficient to avoid a *Bruton* violation since each defendant had two other codefendants, the jury would readily fill in the blanks with the names of the co-defendants); *People v. Banks*, 438 Mich. 408, 475 N.W.2d 769 (1991), *cert. denied*, 502 U.S. 1065 (1992) (Use of blanks was ineffective where "third person" and his actions were so described as to leave no doubt that it was the third person on trial—the defendant); *United States v. Danzey*, 594 F.2d 905, 919 (2d Cir. 1979) *cert. denied*, 441 U.S. 951 (1979) (jury invited to fill in defendant's name when jury told that codefendant had used names

in original statement); *Gutierrez v. State*, 270 Ind. 639, 388 N. E. 2d 520, 527 (1979) (A blank or "x" that, by reasonable inference, refers to one of the co-defendants cannot be said to be permissible merely because it does not reveal which one. Conversely if the persons identified as participants by the out-of-court declaration were not co-defendants, there would be no need to attempt concealment of their identities in the first instance); *United States v. DiGilio*, 538 F.2 972, 983 (3d Cir. 1976) (despite the district court's limiting instruction, the jury might well have drawn the inference that the defendant was the "blank" referred to in his codefendant's statement. Court could not approve of the practice of limited redaction in which the redaction exception gradually swallows up the *Bruton* rule).

B. The Redacted Statement When Viewed in Context Was Even More "Powerfully Incriminating."

If Bell's redacted confession is viewed in the context of the other evidence presented at trial,[14] its admission is even more "powerfully incriminating."[15] While Stacey

[14] Petitioner urges the Court to adopt a "contextual" approach for assessing whether or not a nontestifying codefendant's confession which has been redacted to eliminate the defendant's name, *but not any reference to his or her existence*, should be admitted as evidence at their joint trial. Although the confession in this case was "incriminating on its face," other redacted confessions, which are not facially incriminating, may nonetheless be so "powerfully incriminating" in the context of the other evidence presented at trial that there still exists an "overwhelming probability" that the jury will not likely obey the instructions to disregard the evidence. Such confessions should also be excluded.

[15] Other jurisdictions have adopted a "contextual" approach for assessing whether or not a nontestifying codefendant's redacted confession may be introduced as evidence at a joint trial. Under the "contextual" approach, a nontestifying codefendant's redacted confession may not be admitted at a joint trial where, in the context of the other evidence admitted at trial, there is a "substantial risk" that the jury will consider the codefendant's redacted statement in deciding the guilt of the defendant. *See, e.g., People v. Fletcher*, 13 Cal. 4th 451, 456, 917 P.2d 187, 189 (1996); *People v.*

Williams may have been attacked by six individuals, only three of his alleged assailants were ever identified at trial —Petitioner, Tank, and codefendant Bell. Tracy Brumfield testified that she saw Stacey Williams being chased down the street by Tank, Petitioner, and several other guys. (T. 92, June 21, 1994) Shay Yarberough testified that Tank, Bell, Petitioner and three other guys beat Williams. The guys in this group wore jackets that said "Park Heights."[16] In the context of the other evidence presented at trial, the jury could not help but infer that the deletions in Bell's redacted statement were Petitioner's name and Tank's name.[17] *See, e.g., Smith v. United*

Kahn, 200 AD.2d 129, 136-37, 613 N.Y.S.2d 198, 203-04 (1994); *State v. Tucker*, 10 Haw. App. 43, 861 P.2d 24 (1993); *United States v. Van Hemelryck*, 945 F.2d 1493, 1502-03 (11th Cir. 1991); *Foster v. United States*, 548 A.2d 1370 (D.C. App. 1989); *People v. Cruz*, 121 Ill.2d 321, 330-31, 521 N.E.2d 18, 22-23 (1988); *State v. Johnson*, 71 N.C. App. 90, 92, 321 S.E.2d 510, 513 (1984).

[16] "Deletion" in Bell's redacted statement also wore a black jacket with Park Heights written on the back. (J.A. 12)

[17] Codefendant Bell's redacted statement was read into evidence by Detective Pennington (J.A. 10-12) Immediately thereafter, the prosecutor asked Detective Pennington the following question:

> Q All right, now officer, after he gave you that information, you subsequently were able to arrest Mr. Kevin Gray; is that correct?
>
> A That's correct. (J.A. 12)

In the rebuttal portion of her closing argument, the prosecutor again linked Petitioner to codefendant Bell's redacted confession:

> And, ladies and gentlemen, you just don't rely on the State's witnesses. Mr. Bell, Mr. Bell tells you, an argument broke out between Tank and Stacey in the 500 block of Louden Avenue, somewhere down here. Stacey got smacked and then ran onto Wildwood. Me and a few other guys ran after Stacey. Me, and he was identified by Tracey, Kevin was identified by Tracey and Shay as being in the pack, and he was identified and he put himself there.

Thus, the prosecutor insured that the jury understood that the blank spaces and the terms "deleted" or "deletion" in codefendant Bell's redacted confession referred to Petitioner and Tank.

States, 561 A.2d 468, 474 (D.C. 1989) (admission of written confession with fourteen whited-out blank spaces in lieu of defendant's name when viewed in light of the other testimony adduced at trial virtually invited the jury to use defendant's name to "fill in the blanks"); *Clark v. Maggio*, 737 F.2d 471 (5th Cir. 1984), *cert. denied*, 470 U.S. 1055 (1985) (the jury might well have filled in the blanks from other testimony that the codefendant had provided the police with two names deducing that those two names were the names of his codefendants).

As the Court of Special Appeals of Maryland observed in reversing Petitioner's judgment of conviction:

> Mere deletion of appellant's (and Tank's) name did not effectively make Bell's statement nonincriminating as to appellant. In the context of other evidence (Brumfield's and Yarberough's testimony), the jury need only have taken a short step in inferring that appellant was one of those involved. Stated otherwise, it did not have to make a substantial inference that appellant was the person neutrally referenced in the redacted statement. Therefore, there existed a "substantial risk" that the jury considered the statement in deciding appellant's guilt. Indeed, with Tank dead, the jury was "virtually invited . . . to use [appellant]'s names to "fill in the blanks." *Id.* Simply stated, the use of "deleted" or "deletion" was insufficient to protect appellant against "the practical and human limitations of the jury system." *Bruton*, 391 U.S. at 135, 88 S.Ct. at 1627. *See also Greenwell v. United States*, 336 F.2d 962, 969 (D.C. Cir. 1964) (replacing name of defendant with neutral term such as "named person" insufficient redaction since "with other evidence . . . connecting the co-defendants in the commission of the crime, it is difficult to believe that the jury was unable to divine who the 'anonymous nobody' referred to in the confession was"). Although, as the State argues, there were six perpetrators, any one of which the jury could infer was referred to by the deletions, only three were positively identified—Bell, appellant, and Tank. Appellant's role was clearly demonstrated by Bell's statement, rendering it facially incriminating and constitutionally violative. "To hold that there was not a substantial risk that the [jury] would consider th[e] evidence . . . in considering [a codefendant]'s guilt (limiting instruction or not) would require us to wink at the reality of human behavior of jurors as recognized by the Court in both *Bruton* and *Richardson v. Marsh*." *Foster v. United States*, 548 A.2d 1370, 1379 (D.C. App. 1988). (J.A. 83-84)

It is unrealistic to assume that the mere deletion of Petitioner's name from codefendant Bell's statement protected Petitioner from being "powerfully incriminat[ed]." The redacted statement was "vividly" incriminating. It was as "difficult to thrust out of mind" as a statement which actually named the defendant in *Bruton*. *See, Richardson*, 481 U.S., at 208. The introduction of codefendant's Bell's redacted statement "added substantial, perhaps even critical, weight to the Government's case in a form not subject to cross-examination," *Bruton*, 391 U.S. at 128. The introduction of this statement likely had such a "devastating" effect upon the defense, *Bruton v. United States*, 391 U.S. 123, 136, that there was an "overwhelming probability" that the jury was unable to follow the court's limiting instruction, *Richardson*, 481 U.S., at 208. *See Greer v. Miller*, 483 U.S. 756, 766, n.8 (1987). The use of blank spaces or the terms "deleted or deletion" in redacted statements is simply insufficient to protect defendant's against "the practical and human limitations of the jury system." *Bruton*, 391 U.S. at 135. Thus, it was error to admit codefendant Bell's redacted statement.

CONCLUSION

For the foregoing reasons the judgment of the Court of Appeals of Maryland should be reversed.

Respectfully submitted,

STEPHEN E. HARRIS
Public Defender of Maryland
ARTHUR A. DELANO, JR. *
NANCY S. FORSTER
Assistant Public Defenders
6 St. Paul Street, Suite 1302
Baltimore, Maryland 21202
(410) 767-8556
Counsel for Petitioner

* Counsel of Record

Supreme Court, U.S.
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No. 96-8653

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

KEVIN D. GRAY,

Petitioner,

v.

STATE OF MARYLAND,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

BRIEF FOR RESPONDENT

J. JOSEPH CURRAN, JR.
Attorney General of Maryland

CARMEN M. SHEPARD
Deputy Attorney General

GARY E. BAIR*
MARY ELLEN BARBERA
RACHEL MARBLESTONE KAMINS
Assistant Attorneys General

200 Saint Paul Place
Baltimore, Maryland 21202
(410) 576-6422

Counsel for Respondent

**Counsel of Record*

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QUESTION PRESENTED

Is the Confrontation Clause of the Sixth Amendment complied with when a nontestifying codefendant's confession, redacted to exclude the defendant's name by substituting the words "deleted" and "deletion," is introduced at a joint trial accompanied by an instruction to the jury not to consider the confession against the defendant?

PARTIES TO THE PROCEEDING

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OPINIONS BELOW

The opinion of the Court of Appeals of Maryland reversing the judgment of the Court of Special Appeals of Maryland is reported, *Maryland v. Gray*, 344 Md. 417, 687 A.2d 660 (1997), and is reproduced in the joint appendix. (J.A. 88-108).

The opinion of the Court of Special Appeals of Maryland reversing the judgment of the trial court is reported, *Gray v. Maryland*, 107 Md. App. 311, 667 A.2d 983 (1995), and is reproduced in the joint appendix. (J.A. 69-87).

The unreported opinion of the Circuit Court for Baltimore City, Maryland, denying petitioner's motion for severance is reproduced in the joint appendix. (J.A. 7-9).

STATEMENT OF JURISDICTION

The opinion of the Court of Appeals of Maryland reversing the judgment of the Court of Special Appeals of Maryland and affirming petitioner Gray's conviction was filed on January 15, 1997. The petition for writ of certiorari was filed in this Court on April 15, 1997, and granted on June 16, 1997.

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Amendment VI provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an

impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

STATEMENT OF THE CASE

Six young men beat Stacey Williams to death on November 10, 1993 in Baltimore, Maryland. Petitioner Kevin Gray, Anthony Bell, Jacquin Vanlandingham (known as "Tank"), and several other unidentified individuals chased the victim down the street immediately before the beating. (Tr. 6/21/94, at 91). Tank hit the victim in the mouth and then picked him up and dropped him on his head. (*Id.* at 112-13, 120-22). Gray, too, lifted the victim up and dropped him head-first onto the ground. (*Id.* at 113-14, 120-22). After dropping the victim on his head three times, the young men "stomped" and kicked the victim repeatedly in the neck and head. (*Id.* at 114). After the beating, Bell and Tank grabbed the victim by his neck and dragged him to his girlfriend's house. (*Id.* at 122).

Several hours after the beating, the victim went into seizures and was transported to the hospital. (*Id.* at 123-24, 229). He died the next day of brain trauma and injuries caused by being struck in the head and by his head's striking a hard surface, such as cement or asphalt. (*Id.* at 229).

Bell gave a written statement to the police implicating himself, Gray, Tank, and a "few other guys" in the victim's

death. (J.A. 10-12, 57-60). Other evidence at trial also showed that as many as six persons were involved in the crime. (Tr. 6/21/94, at 114). Gray gave an oral statement to the police in which he denied his involvement in the beating and claimed to have been speaking on a pay telephone when the beating occurred. (Tr. 6/22/94, at 38).

Gray and Bell were scheduled to be tried jointly.[1] Before trial, Gray's attorney moved to exclude Bell's statement from evidence. (J.A. 3).[2] When the trial court suggested redacting the confession to eliminate the names of the persons identified by Bell, counsel for Gray argued that because the statement showed that the beating was a group activity, the jury could nonetheless infer that Gray was one of the persons named by Bell. (J.A. 3). Gray also moved to have his case severed from Bell's, claiming that Bell's statement could only be interpreted by the jury as referring to Gray as one of the participants in the crime. (J.A. 4). If the cases were tried together, Gray argued, he would be denied his right of confrontation because he would be foreclosed from cross-examining Bell about the statement. (J.A. 4).

The trial judge denied the severance motion, saying:

> All right. It seems to me in that light, that there is not a difficulty here with a statement which

---

[1] Tank was fatally shot two days after the incident. (Tr. 6/22/94, at 147-48).

[2] The prosecutor made no attempt at trial to introduce Bell's statement against Gray. Accordingly, any issue relating to the use of Bell's confession as substantive evidence against Gray, *see Williamson v. United States*, 512 U.S. 594 (1994), is not before the Court.

involves two people where we redact the name of the defendant who is making the motion, that there's going to be this compelling implication to the jury that the name that's been redacted or left out must be the name of the co-defendant [Gray].

To the contrary, I think that where you've got group activity and the evidence here is, apparently, going to be that there were at least five, and maybe as many as six men involved in this assault on the victim, to redact this statement, it seems to me, will not unduly prejudice Mr. Gray.

It seems to me that this statement can be sanitized in about three different spots so as to remove the names of Tank and Mr. Gray and the jury will not be left with the unavoidable inference or implication that the person Mr. Bell is referring to in the statement is Mr. Gray.

(J.A. 7-8).

When defense counsel expressed concern that the jury would have only "one other person to choose from because there are not five or six people on trial," the trial judge stated that he would instruct the jury not to consider that the other persons alleged in the statement to have been involved in the crime were not on trial. (J.A. 8). The court also agreed to instruct the jury not to speculate why the other individuals were not on trial and not to consider Bell's statement as evidence against Gray. (J.A. 8-9).

At the joint trial, the prosecution admitted a redacted version of Bell's statement through Detective Homer Pennington, who had interrogated Bell. Before the redacted statement was read into evidence, the judge instructed the jury as follows:

Ladies and gentlemen of the jury, you're about to hear evidence concerning the statement provided by Mr. Bell when he was interviewed by the detective. You should understand, and I will remind you later, that this evidence concerning the statement provided by Mr. Bell is to be considered by you as evidence against Mr. Bell only and in no way is Mr. Bell's statement provided to the detective about which he's about to testify to be considered by you as evidence against Mr. Gray. It is evidence against Mr. Bell only, and as I will instruct you later, you will consider the evidence against each of the defendants individually and reach a separate verdict as to each defendant.

(J.A. 10).

Bell's statement was then read aloud to the jury:

Question, what can you tell me about the beating of Stacey Williams that occurred on 10, November, 1993?

Answer, an argument broke out between *deletion* and Stacey in the 500 block of Louden Avenue. Stacey got smacked and then ran onto Wildwood Parkway. Me, *deleted*, and a few other guys ran after Stacey. We caught up to him on Wildwood Parkway. We beat Stacey up. After we beat Stacey up, we walked him back to Louden Avenue. I then walked over and used the phone, Stacey and the others walked down Louden.

Question, when Stacey was beaten on Wildwood Parkway, how was he beaten?

Answer, hit, kicked.

Question, who hit and kicked Stacey?

Answer, I hit Stacey. He was kicked, but I don't know who kicked him.

Question, who was in the group that beat Stacey?

Answer, me, *deleted, deleted*, and a few other guys.

Question, do you know the other guy's name?

Answer, *deleted, deleted*, and me. I don't remember who was out there.

Question, did anyone pick Stacey up and drop him to the ground?

Answer, no, when I was there.

Question, what was the argument over between Stacey and *deleted*?

Answer, some money that Stacey owed *deleted*.

Question, how many guys were hitting on Stacey?

Answer, about six guys.

Question, do you have a black jacket with Park Heights written on the back?

Answer, yea.

Question, who else has these jackets?

Answer, *deletion*.

Question, after reading this statement, would you sign it?

Answer, yes. He then signed it.

(J.A. 11-12) (emphasis added).[3] The copy of the statement

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[3] There is a minor discrepancy, immaterial to the issue before this Court, between the transcription of Bell's statement

admitted into evidence had blank white spaces where the names once appeared. (J.A. 65-68).

Gray testified in his own defense and claimed to have been speaking to his girlfriend on a nearby pay telephone at the time of the beating. (Tr. 6/23/94, at 5-6, 15). Gray called two other witnesses to support his claim that he was not involved in the beating. (Tr. 6/22/94, at 176-77, 189-91). Bell did not testify at the joint trial.

In its instructions at the close of all the evidence, the trial court reminded the jury:

> You must consider the evidence as it relates to each defendant separately and you must consider separately each offense charged against each defendant. A separate verdict must be returned for each charge against each defendant.
>
> In this connection some of the evidence was admitted only against one of the defendants and not against the other defendant. You must consider such evidence only as it relates to the defendant against whom it was admitted. Each defendant is entitled to have the case decided separately on the evidence that applies to that defendant.

(J.A. 14). The judge also admonished the jury: "[Y]ou should not concern yourself with the fact that others who may be implicated in the criminal offenses are not before

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in the trial transcript and the transcription contained in the joint appendix. The trial transcript reads: "Question, do you know the other guy's name?" (J.A. 11). That same sentence in the transcribed statement contained in the joint appendix reads: "(Q) Do you have the other guys names." (J.A. 62).

you for trial." (J.A. 18).

The jury found Gray and Bell guilty of involuntary manslaughter. (Tr. 6/24/94, at 2-3). Gray received a sentence of ten years, three of which were suspended in favor of five years of supervised probation effective upon his release. (Tr. 8/1/94, at 24).

Gray's conviction was reversed by the Court of Special Appeals of Maryland. (J.A. 87). The state intermediate appellate court held that there was a substantial risk that the jury would consider the confession as evidence of Gray's guilt because the words "deleted" and "deletion" did not render the statement nonincriminating as to Gray. (J.A. 83-84). Adopting a "contextual linkage" analysis, the court concluded that Gray's role in the crime was "clearly demonstrated" by his codefendant's confession and, therefore, Gray's constitutional right of confrontation was violated by its admission into evidence. (J.A. 84).

The Court of Appeals of Maryland reversed the judgment of the Court of Special Appeals, rejecting the contextual implication approach employed by that court. (J.A. 105, 107). Maryland's high court adopted instead a version of the "facial implication" doctrine, which provides that a defendant's right of confrontation is satisfied when a codefendant's confession is redacted so that it does not "facially, or by compelling and inevitable inference, inculpate" the defendant. (J.A. 105). The Court of Appeals held that, as redacted, Bell's confession did not facially implicate Gray. (J.A. 106). Thus, admission of the confession into evidence, coupled with the limiting instruction, did not offend Gray's right of confrontation. (J.A. 106).

SUMMARY OF ARGUMENT

In *Richardson v. Marsh*, 481 U.S. 200 (1987), this Court resolved the question whether redaction of a codefendant's confession to eliminate any reference to the existence of the nonconfessing defendant satisfies the latter's right of confrontation when the jury is instructed to consider the confession only against the confessor. In holding that the Confrontation Clause was satisfied, the Court rejected a "contextual linkage" analysis in favor of a "facial implication" approach. This approach focuses solely on the redacted confession and does not consider any links to the defendant supplied by other evidence in the case. Undergirding the Court's decision in that case were important policy considerations, including the preference for joint trials, the desirability of verdict consistency, and the practical difficulties attendant to use of a contextual linkage approach.

Although the Court left open in *Richardson* the precise question here, i.e., whether the Confrontation Clause is satisfied by substituting neutral references for the nonconfessing defendant's name, the logic of *Richardson* compels an affirmative answer to that question. The identical policy considerations addressed in *Richardson* are at issue here. More importantly, redaction by use of neutral references minimizes the possibility that the jurors will ignore a proper limiting instruction. *See Richardson*, 481 U. S. at 206. Certainly, "there does not exist the overwhelming probability of their inability to do so that is the foundation of *Bruton*'s[4] exception to the general rule."

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[4] *Bruton v. United States*, 391 U.S. 123 (1968).

Richardson, 481 U.S. at 208. Indeed, whenever a confession is redacted to eliminate the defendant's name or its functional equivalent, *Bruton* and *Richardson* are satisfied.

In this case, the codefendant's confession was redacted to eliminate Gray's name, the only identifying reference to him. As redacted, the codefendant's confession did not facially incriminate Gray, even though the confession on its face indicated that others, b_sides the confessor, were involved in the crime. Under the analysis set forth in *Richardson*, there was not an overwhelming probability that the jury would be incapable of following an instruction to consider the confession only against the codefendant. Thus, the redaction, coupled with the cautionary instruction, safeguarded Gray's rights under the Confrontation Clause.

Even if the codefendant's confession were viewed in the context of other evidence adduced at trial, its admission against Bell did not violate the Confrontation Clause. Given the manner of redaction, the number of persons involved in the crime, and the conflicts in the testimony, it was not overwhelmingly probable that the jury would be incapable of following the trial court's instructions.

ARGUMENT

THE CONFRONTATION CLAUSE OF THE SIXTH AMENDMENT IS COMPLIED WITH WHEN A NONTESTIFYING CODEFENDANT'S CONFESSION, REDACTED TO EXCLUDE THE DEFENDANT'S NAME BY SUBSTITUTING THE WORDS "DELETED" AND "DELETION," IS INTRODUCED AT A JOINT TRIAL ACCOMPANIED BY AN INSTRUCTION TO THE JURY NOT TO CONSIDER THE CONFESSION AGAINST THE DEFENDANT.

A. *Bruton* and *Richardson* Provide the Framework for Determining Whether the Admission of a Confession at a Joint Trial Incriminates the Nonconfessing Defendant in Violation of the Confrontation Clause of the Sixth Amendment.

In *Bruton v. United States*, 391 U.S. 123, 135-37 (1968), this Court held that a defendant is deprived of his rights under the Confrontation Clause of the Sixth Amendment when the facially incriminating confession of a nontestifying codefendant is introduced at their joint trial. Underlying the Court's holding was the concern that the trial court's cautionary instruction to the jury could not overcome the substantial risk that the jury would consider the incriminating confession against the confessor's codefendant. *Id.*

Nineteen years later, in *Richardson v. Marsh*, 481 U.S. 200 (1987), the Court clarified that *Bruton* was limited to situations in which facially incriminating statements made

by codefendants are used at trial. The Court recognized that "the [*Bruton*] calculus changes when confessions that do not name the defendant are at issue." *Richardson*, 481 U.S. at 211. Because the confession in *Richardson* was not "incriminating on its face," as had been the confession in *Bruton*, but became incriminating only when tied to other evidence adduced at trial, the court's limiting instructions were likely to prevent the jury from inferring the guilt of the defendant from the codefendant's confession. *Richardson*, 481 U.S. at 208.

Read together, *Bruton* and *Richardson* impart four principles that guide the analysis of the issue presented by this case. First, the Confrontation Clause is violated by the admission of a nontestifying codefendant's confession that expressly incriminates the defendant by name or other identifying reference, notwithstanding a limiting instruction that the confession be used only against the defendant who made it. *Richardson*, 481 U.S. at 208, 211; *Bruton*, 391 U.S. at 135-36. Second, *Bruton* established a "narrow exception" to the "almost invariable assumption of the law" that juries can be trusted to follow the trial court's instructions; that assumption applies to the admission of codefendant confessions that are redacted to eliminate references to other defendants. *Richardson*, 481 U.S. at 206-08. Third, the Confrontation Clause is not violated by the admission of a nontestifying codefendant's confession, with a proper limiting instruction, when the confession is redacted so that it does not facially incriminate the nonconfessing defendant. *Id.* at 211. Fourth, the question whether a nontestifying codefendant's confession implicates the defendant is to be determined from the text of the confession alone, not by reference to other evidence in the case (the "contextual implication" or

"evidentiary linkage" approach). *Id.* at 208-09. The first two principles are not in dispute; the latter two principles lie at the heart of this case.

B. The Compelling Policy Considerations Supporting the Court's Ruling in *Richardson* Apply Equally to Redactions that Substitute Blanks or Neutral References for the Defendant's Name.

This Court in *Richardson* rejected the contextual implication approach to determining whether a confession, redacted to eliminate all references to the nonconfessing defendant's existence, incriminates the nonconfessing defendant in violation of *Bruton*. The Court instead adopted the facial implication doctrine, which provides that only those confessions that on their face directly inculpate codefendants raise Confrontation Clause concerns. *Richardson*, 481 U.S. at 208. Where the incrimination is only inferential, "the judge's instruction may well be successful in dissuading the jury from entering onto the path of inference in the first place, so that there is no incrimination to forget." *Id.* In other words, where the defendant's culpability is established only by viewing the codefendant's confession in conjunction with other evidence in the case, "there does not exist the overwhelming probability" of the jury's inability to obey the court's instructions "that is the foundation of *Bruton*'s exception to the general rule." *Id.* The Court thus made plain in *Richardson* that the analysis focuses exclusively on the confession, not its contextual implications.

The Court's rejection in *Richardson* of the contextual implication analysis in favor of the facial implication

approach was driven, in part, by compelling policy considerations. Those considerations apply equally to redactions that replace the nonconfessing defendant's name, or the functional equivalent thereof, with a blank or neutral reference. First, whereas facial incrimination is curable by redaction that eliminates references to coparticipants, there is no effective way to redact a confession that is incriminating to the nonconfessing codefendant only when tied to other evidence. *Richardson*, 481 U.S. at 209. With *Bruton* limited to facially incriminating confessions, redaction is a simple way to comply with its dictates—a suggestion made by the *Bruton* opinion itself. *Richardson*, 481 U.S. at 208-09, *citing Bruton*, 391 U.S. at 134 n.10.

Second, if a contextual implication approach were used, then a trial judge who is asked to rule on motions to exclude the confession or to sever the trials would be burdened with the task of considering not only the confession itself but also other evidence, which typically will not yet have been presented. *Richardson*, 481 U.S. at 209. It would often be impossible for a trial judge to predict the admissibility of a confession in advance of the trial. *Id.* To remedy the situation, the trial judge would be faced with the choice of having to (1) assess at the end of the trial whether the confession, viewed in conjunction with the other evidence, incriminated the defendant so as to entitle him to a new trial; or (2) conduct a pretrial hearing at which both the prosecution and the defense would be required to reveal the evidence they planned to introduce. *Id.* As the Court observed in *Richardson*, both approaches open the door to manipulation by the defense, numerous mistrials and appeals, and overall judicial inefficiency. *Id.*

Third, prohibiting the use at joint trials of confessions that are not facially incriminating would result in fewer joint trials, thereby exacting a significant toll on the trial's participants and society as a whole. Separate trials of codefendants necessitate that the prosecutor repeatedly present the same evidence. The attendant inconvenience, trauma, and, sometimes, danger to victims and witnesses is not insignificant. *See id.* at 210. And, the last-tried defendant is "randomly favored" by "knowing the prosecution's case beforehand." *Id.* This Court has expressed its preference for joint trials because they play a "vital role in the criminal justice system . . . by enabling a more accurate assessment of relative culpability." *Id.* at 209-10. Moreover, joint trials "promote efficiency and 'serve the interests of justice by avoiding the scandal and inequity of inconsistent verdicts.'" *Zafiro v. United States*, 506 U.S. 534, 537 (1993), *quoting Richardson*, 481 U.S. at 210; *see also United States v. Lane*, 474 U.S. 438, 449 (1986) (joint trials "conserve state funds, diminish inconvenience to witnesses and public authorities, and avoid delays in bringing those accused of crime to trial"), *quoting Bruton*, 391 U.S. at 134.

The alternative of using multiple juries, suggested by Gray's amicus, (NACDL Amicus Br. 15), could likewise lead to inconsistent verdicts, and has other drawbacks, as well.[5] The procedure can impose an inordinate burden on

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[5] Numerous lower courts have disapproved of using multiple juries in a single trial. *See, e.g., Beam v. Paskett*, 3 F.3d 1301, 1304 (9th Cir. 1993) (multiple juries increase complexity and likelihood of error, and impair each defendant's ability to present a defense), *cert. denied*, 511 U.S. 1060

the trial court in coordinating the two juries, maintaining their segregation, and ensuring their equal treatment. The technique may entail separate jury venires, instructions to the juries not to communicate, courtrooms large enough to accommodate multiple juries, excessive moving of the juries in and out of the courtroom, separate sets of jury instructions, duplicate exhibits, and staggered verdicts. And, inasmuch as certain procedures, such as opening statements, closing arguments, and cross-examination of

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(1994); *United States v. Sidman*, 470 F.2d 1158, 1170 (9th Cir. 1972) (expressing disapproval of use of two-jury trials), *cert. denied*, 409 U.S. 1127 (1973); *People v. Rainge*, 445 N.E.2d 535, 551 (Ill. App. 1983) (use of dual juries should not be encouraged because of problems inherent in keeping track of "who testified before which jury, and even which jury is hearing which testimony"), *cert. denied*, 467 U.S. 1219 (1984); *State v. Watson*, 397 So. 2d 1337, 1342 (La.) (discouraging use of dual juries absent criminal procedure guidelines), *cert. denied*, 454 U.S. 903 (1981); *Scarborough v. State*, 437 A.2d 672, 674-76 (Md. App. 1981) (condemning use of dual juries because "all the risks inherent in the traditional jury system become two-fold"), *cert. denied*, 292 Md. 639 (1982); *Ewish v. State*, 871 P.2d 306, 316 (Nev. 1994) (instructing lower courts to refrain from dual jury trials absent guidelines or statutes because such trials are administratively cumbersome and "a breeding ground for curious results, tainted justice, and issues for appeal"); *State v. Corsi*, 430 A.2d 210, 213 (N.J. 1981) (recommending against using dual jury procedure, noting it is exception rather than rule); *People v. Ricardo B.*, 535 N.E.2d 1336, 1339 (N.Y. 1989) (holding that multiple juries are exception, not rule, and "are to be used sparingly and then only after a full consideration of the impact the procedure will have on the defendants' due process rights").

particular witnesses would have to be repeated for the benefit of each jury, the defense attorney going last will benefit from knowing what to expect.

Finally, to forgo the use of codefendant confessions altogether in such situations is too dear a price to pay in view of "society's compelling interest in finding, convicting, and punishing those who violate the law." *Richardson*, 481 U.S. at 210, *quoting Moran v. Burbine*, 475 U.S. 412, 426 (1986). "[A]dmissions of guilt by wrongdoers, if not coerced, are inherently desirable." *United States v. Washington*, 431 U.S. 181, 187 (1977). Indeed, excluding constitutionally valid confessions from the purview of the jury distorts the fact-finding and truth-seeking processes at the heart of the judicial system. "We are, after all, always engaged in a search for truth in a criminal case so long as the search is surrounded with the safeguards provided by our Constitution." *Oregon v. Hass*, 420 U.S. 714, 722 (1975) (evidence violative of *Miranda v. Arizona*, 384 U.S. 436 (1966), is inadmissible in prosecution's case-in-chief but admissible for impeachment purposes; impeaching material would provide valuable aid to jury in assessing defendant's credibility); *see also Moran v. Burbine*, 475 U.S at 427 (expanding *Miranda* rules to require police to inform suspect of status of legal representation is unnecessary for protections of Fifth Amendment privilege and "would come at a substantial cost to society's legitimate and substantial interest in securing admissions of guilt"); *Michigan v. Tucker*, 417 U.S. 433, 450 (1974) (system of justice has strong interest in "making available to the trier of fact all concededly relevant and trustworthy evidence which either party seeks to adduce"); *Harris v. New York*, 401 U.S. 222, 226 (1971) ("The shield provided by

Miranda cannot be perverted into a license to use perjury by way of a defense, free from the risk of confrontation with prior inconsistent utterances.").

The compelling reasons set forth in *Richardson* for permitting redaction notwithstanding possible contextual linkage were critical to the result in that case. Those considerations apply equally to this case and dictate the same conclusion.

C. A Codefendant's Confession Redacted by Substituting Blanks or Neutral References for the Defendant's Name Does Not Facially Incriminate the Defendant.

Although the Court in *Richardson* reserved ruling on the admissibility of confessions in which the defendant's name has been replaced by a symbol or neutral pronoun, 481 U.S. at 211 n.5, the reasoning of that case logically extends to confessions redacted in that manner. So long as a proper limiting instruction is given, the *Bruton-Richardson* doctrine plainly permits the use at trial of a confession redacted to include only neutral references to codefendants. A statement in which the name of the defendant has been deleted or replaced with some nonspecific term does not "expressly" or "facially" incriminate the defendant within the contemplation of the doctrine.

Bell's redacted statement did not facially incriminate Gray. The statement did not name Gray as a participant in the crime, nor did it contain references to the functional equivalent of his name, i.e., any information that readily and unmistakably identified him as one of the persons referred to as "deleted" or "deletion." The copy of the

statement admitted into evidence had blank white spaces where the names once appeared. (J.A. 65-68). The statement merely informed the jury that others, besides the declarant, were at the scene and involved in the incident.

Gray and his amicus nevertheless complain that Bell's confession should have been redacted to eliminate all references to his existence, as was done in *Richardson*. (Pet. Br. 12-14; NACDL Amicus Br. 12-14).[6] Gray, however, never suggested a *Richardson* redaction and, indeed, voiced no objection to the method of redaction directed by the trial court, despite ample opportunity to do so. (Tr. 6/17/94, at 52-56; Tr. 6/20/94, at 33-35; Tr. 6/21/94, at 252; Tr. 6/22/94, at 4-5).[7]

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[6] Gray and his amicus also take issue, for the first time in this Court, with the fact that the names of Gray and Tank were concealed by white-out, because that method of redaction signaled to the jury that names had been omitted. (Pet. Br. 12-14; NACDL Amicus Br. 11). This charge is groundless. A jury's awareness that names have been redacted from a confession is not tantamount to a conclusion on its part as to *whose* names have been omitted.

[7] Notwithstanding the trial court's suggestion that the prosecutor and defense counsel confer on the best way to redact the statement, (Tr. 6/17/94, at 52), defense counsel hewed to her "all-or-nothing" position that severance was required or, in the alternative, that the entire statement should be excluded, (Tr. 6/17/94, at 4-5, 45-46, 54-55). When the trial court asked defense counsel whether she agreed to the proposed redaction, counsel, knowing full well that the redaction would consist of whiting out the names of Gray and Tank, replied, "As a lesser evil I think it needs to be redacted." (Tr. 6/20/94, at 33).

In any event, that this Court in *Richardson* approved one particular method of redaction does not mean that all other methods of redaction are prohibited. The relevant inquiry is not whether one method is more favorable to the defendant than another, but, rather, whether the method employed satisfies constitutional dictates. *See Marshall v. Lonberger*, 459 U.S. 422, 438 n.6 (1983). In an analogous context, this Court has ruled that there are no "categorical evidentiary prerequisites" to satisfying the Confrontation Clause. *Maryland v. Craig*, 497 U.S. 836, 860 (1990). Thus, contrary to the suggestion of Gray and his amicus, the Confrontation Clause does not mandate that the radical redaction used in *Richardson* be performed in every case.

Indeed, the redaction approved in *Richardson* may not be appropriate in all cases. "[T]he deletion must not be such that it will distort the statements to the substantial prejudice of either the declarant or the Government." *Bruton*, 391 U.S. at 143 (White, J., dissenting). Redaction that requires substantial rewriting of the document may be at odds with the common law doctrine of completeness embodied in Federal Rule of Evidence 106. *See Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 172 (1988) (where part of document is admitted, rule of completeness requires admission of other portions of document that are necessary to avoid confusion or distortion); *United States v. Nobles*, 422 U.S. 225, 231 (1975) ("The ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts."), *quoting United States v. Nixon*, 418 U.S. 683, 709 (1974).

The goal of the Confrontation Clause is to advance the integrity of the truth-determining process in criminal trials by ensuring that the trier of fact has sufficient information

to "find the truth." *See Bourjaily v. United States*, 483 U.S. 171, 182 (1987); *Chambers v. Mississippi*, 410 U.S. 284, 295 (1973); *Dutton v. Evans*, 400 U.S. 74, 89 (1970); *California v. Green*, 399 U.S. 149, 161 (1970). "There is no gainsaying that arriving at the truth is a fundamental goal of our legal system." *James v. Illinois*, 493 U.S. 307, 311 (1990), *quoting United States v. Havens*, 446 U.S. 620, 626 (1980). Redaction that creates confusion and distortion runs counter to these truth-seeking objectives.

To ensure that evidence is presented to the jury as completely and accurately as possible, trial courts must be permitted to exercise their discretion to determine which method of redaction best achieves that goal, taking into account such factors as the length of the statement, whether it was written, audiotaped or videotaped, the ease with which redaction may be accomplished, and local trial practices. The weight a jury affords a confession may well depend on its form and wording, and the process of redaction should not distort the jury's ability properly to evaluate it. So long as the redaction produces a statement that does not facially incriminate the nonconfessing defendant, it comports with Sixth Amendment dictates.

Maryland, like amicus for Gray, believes this Court can draw a "principled and practical" line, (NACDL Amicus Br. 3), between confessions that satisfy the *Bruton-Richardson* doctrine and those that do not. Maryland, however, believes that the line should be drawn at a different place. Under Maryland's proposed rule, codefendant confessions that do not name or otherwise identify the defendant in such a way as to be the functional equivalent of the defendant's name are admissible at joint trials, so long as the jury is instructed to consider the statement only against the confessing

defendant. This rule is clear, easy to apply, and is consonant with the goals of the Confrontation Clause.

D. The Trial Court's Cautionary Instruction to the Jury Not to Consider Bell's Confession Against Gray Ensured that the Jury Would Properly Limit Its Consideration of that Evidence.

Removing Gray's name from Bell's confession enabled the jury to follow the trial court's instruction to consider Bell's confession solely against Bell. Unlike the situation in *Bruton*, where the jurors were confronted with the defendant's name and then told to "wipe it from their brains," *see* 391 U.S. at 129, Gray's jury was not called upon to ignore a vital piece of evidence to which its attention had just been directed. As this Court observed in *Richardson*, "the calculus changes when confessions that do not name the defendant are at issue." 481 U.S. at 211. "Specific testimony that 'the defendant helped me commit the crime' is more vivid than inferential incrimination, and hence more difficult to thrust out of mind." *Id.* at 208. When a confession is redacted to eliminate the defendant's name, thereby rendering any incrimination merely inferential, "the judge's instruction may well be successful in dissuading the jury from entering onto the path of inference in the first place, so that there is no incrimination to forget." *Id.*

Here, the trial court instructed the jury, both when the statement was admitted into evidence, (J.A. 10), and at the close of all the evidence, (J.A. 14, 18), not to consider Bell's confession as evidence against Gray. The court also admonished the jury generally to consider the evidence only as it related to the defendant against whom it was

admitted. (J.A. 14). These instructions, coupled with the redaction that omitted Gray's name from Bell's confession, ensured that the confession would be considered for the limited purpose for which it was admitted.

The jury's task in this regard was not particularly difficult to perform. In *Richardson*, this Court catalogued several analogous, and even more difficult, situations in which juries routinely are called upon and expected to follow instructions to consider evidence for one purpose but not another, or against one defendant but not a codefendant. *See* 481 U.S. at 206-07 (collecting cases). Since *Richardson*, this Court has continued to adhere to the presumption that juries can and do follow limiting instructions. *See, e.g., Romano v. Oklahoma*, 512 U.S. 1, 13 (1994) (admission of evidence in capital case regarding defendant's prior death sentence did not deprive defendant of fair sentencing proceeding because trial court's instruction explicitly precluded jurors' consideration of prior sentence as aggravating factor); *Huddleston v. United States*, 485 U.S. 681, 691-92 (1988) (concern that other crimes evidence posed danger of prejudice mitigated by trial court's instruction to jury to consider similar acts evidence only for limited purpose for which it was admitted). Surely a jury that can consider a defendant's prior convictions only as they relate to his credibility can follow an instruction not to link a defendant to evidence that, on its face, does not even mention him.

This Court has held that a defendant's *Miranda*-violative confession can be used for impeachment of the defendant's credibility, but not as substantive evidence. *Harris v. New York*, 401 U.S. at 225-26. Implicit in this holding is the assumption that juries can follow an instruction to ignore a defendant's confession in deciding his guilt or innocence.

If juries can be counted on to accomplish that feat, they certainly can follow the kind of instruction that was given in Gray's case.[8]

Gray and his amicus have no quarrel with the limiting instruction given in this case. They do argue, however, that the instruction was undermined by the prosecutor's rebuttal closing argument, the order in which she posed her questions to Detective Pennington, and the fact that she adduced evidence that Gray owned a "Park Heights" jacket. They claim that the prosecutor "linked Petitioner to codefendant Bell's redacted confession," (Pet. Br. 15 n.17), by "explicitly connecting Bell's statement to Gray's arrest," (NACDL Amicus Br. 12-13). Amicus argues that

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[8] Amicus for Gray cites two empirical studies that have found that juries generally misunderstand and thus are incapable of following trial courts' instructions. (NACDL Amicus Br. 4 n.3). Notwithstanding these and other studies which, over the years, have stated this as a general proposition, this Court, as discussed in the text above, consistently has adhered to the belief that juries can and do follow limiting instructions. Were this body of social science research to be accepted, the entire foundation of the jury system would collapse. As this Court stated in *Richardson*, the presumption that juries follow instructions is "rooted less in the absolute certitude that the presumption is true than in the belief that it represents a reasonable practical accommodation of the interests of the state and the defendant in the criminal justice process." 481 U.S. at 211; *see also Gacy v. Welborn*, 994 F.2d 305, 314 (7th Cir.) ("The jury is a means to resolve disputes, not a waystation by which the controversy at trial is transported to a higher level of generality as a social science dispute about juries."), *cert. denied*, 510 U.S. 899 (1993).

this "prosecutorial manipulation" of the evidence "guaranteed that the cautionary instruction was ineffective." (*Id.*). This contention, made for the first time in this Court,[9] is belied by the record.

When read in context, the portion of the prosecutor's rebuttal closing argument to which Gray refers in no way linked Gray with Bell's confession. The remarks merely alluded to the testimony of two prosecution witnesses, Shay Yarberough and Tracey Brumfield, placing Gray at the scene of the crime. The fact that the prosecutor mentioned portions of Bell's redacted confession in conjunction with evidence that Gray was among the group of men involved in the beating was not impermissible "linkage"—but was, instead, appropriate closing argument. *See Donnelly v. DeChristoforo*, 416 U.S. 637, 647 (1974) (court should not readily infer most damaging meaning from prosecutor's ambiguous remark, nor conclude that "a jury, sitting through lengthy exhortation, will draw that meaning from the plethora of less damaging interpretations").

Gray's challenge to the propriety of the prosecutor's

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[9] At trial, Gray did not object to either the prosecutor's comments, (J.A. 50-51), or the direct examination of Detective Pennington, (Tr. 6/22/94, at 33), and lodged only an untimely general objection to the prosecutor's eliciting of evidence concerning the "Park Heights" jackets, (Tr. 6/21/94, at 125, 206). Nor did Gray raise, brief, or argue these points in the state appellate courts or in his petition for writ of certiorari in this Court. Thus, none of these claims is properly before the Court. *See Yee v. City of Escondido*, 503 U.S. 519, 535-37 (1992) (issue not raised in or addressed by state courts nor raised in petition for certiorari not properly before Court).

direct examination of Detective Pennington also misses the mark. Amicus for Gray maintains that the prosecutor created the impression that information provided to the police by Bell led directly to Gray's arrest, thereby linking Gray to the deletions in Bell's confession. (NACDL Amicus Br. 12-13). On the contrary, the context of the detective's testimony shows that the sequence of the questions related chronologically to the phases of the investigation, not to any nexus between Bell's confession and Gray's arrest.[10]

Finally, Gray's amicus takes issue with the fact that the prosecutor "elicited testimony from witnesses linking Gray to a jacket emblazoned with 'Park Heights,'" thereby ensuring that the jury would connect him with Bell's confession, which made mention of such jackets.

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[10] Detective Pennington testified that Gray was developed as a suspect and an arrest warrant was obtained for him *before* Bell was ever questioned. The detective testified that on January 11 and 13, 1994, he interviewed Tracey Brumfield and Shay Yarberough, who identified Gray, Bell, and Tank as participants in the beating. (Tr. 6/22/94, at 15-16). Based on that information, Detective Pennington obtained arrest warrants for Bell and Gray. (*Id.* at 16-17). The police arrested and interrogated Bell the next day but could not locate Gray until January 19. (*Id.* at 17, 33). Because Bell was the first suspect to be interrogated, the prosecutor naturally questioned Detective Pennington first about Bell's statement. (*Id.* at 18-33). The prosecutor then made the transition from Bell's statement to Gray's statement, which Gray gave to the police five days later: "All right, now, officer, after [Bell] gave you that information, you subsequently were able to arrest Mr. Kevin Gray; is that correct?" (*Id.* at 33).

(NACDL Amicus Br. 13). In the first instance, Bell's reference to the Park Heights jacket was, in and of itself, wholly innocuous. He stated simply that "deletion" owned such a jacket. (J.A. 12, 56). Furthermore, that the prosecutor adduced testimony that Gray himself owned a Park Heights jacket did not compel the inference that Gray was the jacket owner referred to in the confession. For all the jury knew, a number of people had such jackets and there is no reason to assume they were all present at the crime scene. Even more to the point, the prosecutor did not argue to the jury in closing that Gray's Park Heights jacket linked him to Bell's confession.

Thus, the alleged linkage about which Gray and his amicus so strenuously complain was nonexistent. Under their theory that every piece of prosecution evidence improperly "linked" Gray to Bell's confession, the prosecutor would be foreclosed from adducing *any* evidence tending to establish Gray's involvement in the beating, lest it be considered to subvert the redaction and its accompanying jury instruction. Forcing the prosecution to try its case in such a straightjacket surely was not an intended outcome of *Richardson*.

E. Even Under a Contextual Implication Analysis, It Was Not Overwhelmingly Probable that the Jury Would be Unable to Follow a Limiting Instruction Not to Consider Bell's Statement Against Gray.

Even if this Court were to apply a contextual implication analysis to this case, the judgment below should be affirmed. As redacted, the confession does not

specify the number of named participants in the crime.[11] But even assuming that the jury inferred from the confession that Bell had named only two people, all of the evidence implicated Bell and *five* others in the commission of the crime, any two or more of whom could have been the persons referred to in the statement as "deleted" and "deletion." Redaction that substitutes pronouns or similar neutral and nonidentifying terms for the name of a codefendant accords with the *Bruton-Richardson* doctrine if the crime was committed by a number of people, any one of whom could have been the coparticipant mentioned in the confession.[12] Because the evidence indicated that

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[11] In fact, the redacted confession did not make clear that Bell named *only* two other people in his confession. It is true that a jury bent on disregarding the limiting instruction might have been able to infer that Bell named *at least* two persons, because there are places where the manner of redaction would have permitted the jury to infer that at least two different names were given. (J.A. 10-12, 65-68). But there would have been no way for the jury to know who Bell referred to at various other points where the words "deleted" and "deletion" were used, and thus there is no way to tell from the redacted confession precisely how many people Bell named as having been involved in the assault.

[12] Many lower courts embrace this logic. *See, e.g., United States v. Washington*, 952 F.2d 1402, 1404-05 (D.C. Cir. 1991) (use of indefinite pronoun or other general term in place of name of defendant did not create "inevitable association with" the defendant because terms could just as easily have been referring to one of two other persons involved in charged offense), *cert. denied*, 503 U.S. 1009 (1992); *United States v. Donahue*, 948 F.2d 438, 444 (8th Cir. 1991) (references in

five individuals besides Bell participated in the crime, the redacted confession did not automatically compel the conclusion that Gray was among them.

Moreover, the prosecution's theory at trial was that Bell's statement to the police was self-serving and, therefore, untrustworthy inasmuch as he minimized his own involvement in the crime. (Tr. 6/23/94, at 125-26). The prosecutor urged the jury to disbelieve those self-

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codefendant's confession to "everyone" and "they" did not expressly implicate defendant and so it was not overwhelmingly probable that jurors would not be able to follow instructions to consider statement against declarant only), *cert. denied*, 503 U.S. 976 (1992); *United States v. Briscoe*, 896 F.2d 1476, 1502 (7th Cir.) (reference to "we" in codefendant's confession could just as easily have referred to one group of defendants as to another; defendant must be directly implicated "by being specifically identified [in the statement] or by being the only other participant in the charged crime"), *cert. denied*, 498 U.S. 863 (1990); *People v. Fletcher*, 917 P.2d 187, 195 (Cal. 1996) (substituting pronouns or other nonidentifying terms for defendant's name complies with defendant's confrontation right if crime was committed by number of people); *Harris v. State*, 462 S.E.2d 425, 427 (Ga. App. 1995) (statement redacted by replacing defendant's name with "someone" did not directly implicate defendant, inasmuch as there were six or seven persons present when crime was committed, any one of whom could have been the "someone" who committed crime); *Commonwealth v. Rawls*, 419 A.2d 109, 112-13 (Pa. Super. 1980) (where references to two other defendants were replaced with words "other fellows," "they," "someone," and "one of the guys," statement was not powerfully incriminating to defendant because it alone did not serve to connect him with crime), *appeal dismissed*, 452 A.2d 1347 (Pa. 1982).

serving aspects of Bell's confession and to credit instead the State's evidence showing Bell's leadership role in the beating. (*Id.* at 126-27; Tr. 6/21/94, at 114, 119). For his part, Gray claimed that he was near the scene at the time of the crime, but did not participate in its commission. He and his defense witnesses testified that he was talking with his girlfriend at a pay telephone while the beating occurred.

Thus, not only did the jury hear that much of Bell's confession was not to be trusted, they heard two very different versions of Gray's complicity in the crime: the State's, putting Gray at the heart of the affray, and Gray's, not denying that the crime occurred and that Bell and others participated in it, but denying that he, Gray, was one of those persons. The evidence in its entirety, then, did not impel the jury to disobey the judge's instruction and insert Gray's name into Bell's confession.

But, even assuming the jury had been inclined to head down "the inferential path" the instruction was designed to avoid, and to speculate about the identity of the deleted persons, it still does not follow that the jury would necessarily have substituted Gray's name for "deleted." The actions attributed to the persons whose names were deleted from the confession were not so distinctive as to compel the jury to match that conduct with Gray by resorting to other evidence identifying him with that conduct. Bell merely alleged in his confession that "deleted" and "deletion" were among a group of men who chased, hit, and kicked the victim. (J.A. 11, 55).

Although there may be situations where a contextual implication approach would yield a contrary result, this is not one of them. Given the nature of the crime, the multiple participants, the manner of redaction, and the

presentation of evidence at trial, Gray's right of confrontation was adequately protected.

CONCLUSION

For the foregoing reasons, the State of Maryland respectfully requests that the judgment of the Court of Appeals of Maryland be affirmed.

Respectfully submitted,

J. JOSEPH CURRAN, JR.
Attorney General of Maryland

CARMEN M. SHEPARD
Deputy Attorney General

GARY E. BAIR*
MARY ELLEN BARBERA
RACHEL MARBLESTONE KAMINS
Assistant Attorneys General

Counsel for Respondent

**Counsel of Record*
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In The

Supreme Court of the United States

October Term, 1997

KEVIN D. GRAY,

Petitioner,

v.

STATE OF MARYLAND,

Respondent.

On Writ Of Certiorari To The Court Of Appeals Of Maryland

REPLY BRIEF ON THE MERITS

STEPHEN E. HARRIS
Public Defender of Maryland

ARTHUR A. DELANO, JR.*
NANCY S. FORSTER
Assistant Public Defenders

6 St. Paul Street, Suite 1302
Baltimore, Maryland 21202
(410) 767-8556

Counsel for Petitioner

**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Did the introduction at a joint trial of a redacted confession of a nontestifying codefendant deprive Petitioner of his Sixth Amendment right of confrontation?

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ARGUMENT

THE INTRODUCTION OF A REDACTED CONFESSION OF A NONTESTIFYING CODEFENDANT DEPRIVED PETITIONER OF HIS CONSTITUTIONAL RIGHT OF CONFRONTATION UNDER THE SIXTH AMENDMENT.

Respondent contends that Petitioner was not deprived of his constitutional right to confront his accusers under the Sixth Amendment when a nontestifying codefendant's confession, redacted to exclude Petitioner's name by substituting the words "deleted" and "deletion," was introduced at their joint trial accompanied by an instruction to the jury not to consider the redacted confession to the nontestifying codefendant against Petitioner. (Res. Br. 11) According to Respondent, "whenever a confession is redacted to eliminate the defendant's name or its functional equivalent, *Bruton [v. United States*, 391 U.S. 123 (1968)] and *Richardson [v. Marsh*, 481 U.S. 200 (1987)] are satisfied." (Res. Br. 10).

Respondent urges the Court to adopt the "facial implication" doctrine. While the facial implication doctrine has a certain "simplistic appeal,"[1] the doctrine

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[1] The Court of Appeals of Maryland did not adopt a version of the "facial implication" doctrine. (Res. Br. 8) The Court of Appeals rejected the facial implication doctrine "in its most pristine form" (J.A. 100) The Court noted that "while the facial implication doctrine has simplistic appeal, redacted confessions with 'neutral pronouns may still prove impossible to thrust out of mind.' " (J.A. 99) The Court of Appeals adopted a version of the "contextual" or "evidentiary linkage" approach. Maryland's highest court held that "a *Bruton* violation occurs when a codefendant's confession, either facially, *or by compelling an inevitable inference*, inculpates a nonconfessing defendant."

should be rejected by the Court because, in practice, it affords little, if any, protection against the "substantial threat" to a defendant's right to confront the witnesses against him posed by the introduction, at a joint trial, of a redacted confession of a nontestifying codefendant.

A. A REDACTED CONFESSION OF A NONTESTIFYING CODEFENDANT WHICH, DIRECTLY OR INDIRECTLY, IMPLICATES A DEFENDANT SHOULD NOT BE ADMITTED AT A JOINT TRIAL.

In urging the Court to adopt the "facial implication" doctrine, Respondent all but ignores the Court's historic unwillingness to allow a statement of a codefendant/accomplice which implicates a defendant to be admitted into evidence unless the codefendant/accomplice is subject to the scrutiny of cross-examination. Since "*Douglas [v. Alabama*, 380 U.S. 415, 419 (1965)], the Court has spoken with one voice in declaring presumptively unreliable accomplices' confessions that incriminate defendants." *Lee v. Illinois*, 476 U.S. 530, 541 (1986) Such statements "have traditionally been viewed with special suspicion. Due to his strong motivation to implicate the defendant and to exonerate himself, a codefendant's statements about what the defendant said or did are less credible than ordinary hearsay evidence." *Id.*, 475 U.S., at 541. As

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(J.A. 105) (Emphasis added) The Court, applying the "contextual" approach, affirmed Petitioner's conviction because "while we agree that the jury *could have* reasonably inferred that one of the deleted names belonged to Gray, that inference was not compelled." (J.A. 105)

the Court in *Lee* observed, the "truth finding function of the Confrontation Clause "is *uniquely threatened* when an accomplice's confession is sought to be introduced against a criminal defendant without the benefit of cross-examination." *Id.*, 476 U.S., at 541 (Emphasis added) *Cf., Williamson v. United States*, 512 U.S. 594, 601 (1994).[2]

The confession of a nontestifying codefendant which, despite the redaction of the defendant's name, directly or indirectly,[3] implicates the defendant is also "presumptively unreliable" and no less "inevitably suspect." Given the fact that a nontestifying codefendant's confession which either, directly or indirectly, implicates a defendant is "presumptively unreliable," its introduction at joint trials without the benefit of cross-examination should likewise be limited.[4]

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[2] *Compare, Bourjaily v. United States*, 483 U.S. 171 (1987) (because hearsay rules and the Confrontation Clause are generally designed to protect similar values, separate reliability inquiry not required where evidence falls within firmly rooted coconspirator exception to hearsay rule).

[3] In determining whether a redacted confession of a nontestifying codefendant actually implicates a defendant, the trial court must consider the confession in the context of the other evidence to be presented at trial. *Cf. Williamson*, 512 U.S., at___. Whether a statement is self-inculpatory or not can only be determined by viewing it in context); *Bourjaily*, 483 U.S., at 179 (evidence gains probative force from surrounding evidence)

[4] Had Petitioner been afforded the opportunity to cross-examine codefendant Bell, he could have shown that Bell's confession was motivated by his desire to implicate others and thereby lessen his own blameworthiness. *See, Davis v. Alaska*, 415 U.S. 308 (1974).

A redacted confession of a nontestifying codefendant which, directly or indirectly, implicates the defendant remains "powerfully incriminating." While "specific testimony that 'the defendant helped me commit the crime' is more vivid than inferential incrimination, and hence more difficult to thrust out of mind," *Richardson*, 481 U.S., at 208, a redacted confession that, unlike the confession in *Richardson*, not only reveals the existence of another participant, but, directly or indirectly, implicates the defendant is also "vivid" and "difficult to thrust out of mind."

Codefendant Bell's redacted confession illustrates just how "vivid" inferential incrimination can be.[5] Bell's

[5] Respondent, for the first time asserts that Petitioner "voiced no objection to the method of redaction directed by the trial court, despite ample opportunity to do so." (Res. Br. 19) The method of redaction was selected by the trial judge. (J.A. 8) Thereafter, when the trial judge explained that "there were six people involved, and, therefore, to take out all of the names, that will not hurt Mr. Gray, it seems to me," defense counsel reminded the trial judge that "there are not five or six people on trial." (J.A. 8) When defense counsel argued that admission of Bell's redacted confession "makes the case against Mr. Gray stronger . . . [b]ecause two people were named, one of them admits, oh, yes, I was involved, that clearly makes the evidence of that one witness appear more believable, and that witness is stating that two people were recognized," the trial judge simply responded "I understand your position. Your motion for a severance is denied." (J.A. 9) Although defense counsel did not suggest an alternative method of redaction, she clearly did not acquiesce in the trial court's ruling. Respondent did not raise a question of preservation in its brief in opposition or, for that matter, in the Court of Special Appeals of Maryland or the Court of Appeals of Maryland. *See*, Supreme Court Rule 15.3 which provides that "any objection to consideration of a question presented based on what occurred in the proceedings below, if the objection does not go to jurisdiction, may be deemed waived unless called to the Court's attention in the brief in opposition.

redacted confession did more than "merely inform the jury that others, besides the declarant, were at the scene and involved in the incident." (Res. Br. 19) The redacted confession informed the jury that two persons whose identity were known to codefendant Bell and "several others persons" were involved in the beating of Stacey Williams. Thus, the jury's attention was drawn to Petitioner not only by the use of the terms "deleted" and "deletion," but also by the fact that two names had been deleted from Bell's confession and only three perpetrators, i.e., Bell, Petitioner and Tank, had been identified by name by other witnesses.[6] As the Court of Special Appeals of Maryland observed in reversing Petitioner's conviction, "in the context of other evidence (Brumfield's and Yarberough's testimony), the jury need only have taken a short step in inferring that [Petitioner] was one of those involved. Indeed, with Tank dead, the jury was

[6] Respondent is also in error when it contends that "unlike the situation in *Bruton*, where the jurors were confronted with the defendant's name and then told to 'wipe it from their brains,' *See* 391 U.S. at 129, Gray's jury was not called upon to ignore a vital piece of evidence to which its attention had just been directed." (Res. Br. 22) The jurors' attention was inevitably drawn to the terms "deleted" and "deletion." The use of these terms, in and of themselves, called upon the jury to ignore a vital piece of evidence. The terms "deleted" and "deletion" cannot be construed as "neutral, non-identifying terms." *See*, United States Amicus Br. 16. The admission of Bell's redacted confession had an "immediate and dramatic impact" upon the jury. *See*, United States Amicus Br. 19.

"virtually invited . . . to use [Petitioner]'s name to 'fill in the blanks.' "[7] (J.A. 83-84)

B. A JURY CANNOT BE RELIED UPON TO DISREGARD A REDACTED CONFESSION OF A NONTESTIFYING CODEFENDANT WHICH, DIRECTLY OR INDIRECTLY, IMPLICATES A DEFENDANT EVEN IF INSTRUCTED TO DO SO.

Respondent asserts that both before and after *Richardson*, the Court has approved of the use of limiting instructions in "several analogous, and even more difficult, situations in which juries routinely are called upon and expected to follow instructions to consider evidence for one purpose but not another, or against one defendant but not a codefendant." (Res. Br. 23) While the Court has approved of the use of limiting instructions in a variety of situations, the situations are neither "anologous" to nor "more difficult" than the situation presented in this case.[8]

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[7] In affirming Petitioner's conviction, the Court of Appeals of Maryland concluded, "the jury *could have* reasonably inferred that one of the deleted names belong to [Petitioner]." (J.A. 105)

[8] In *Richardson*, 481 U.S., at 211, the Court recognized that the rule "that juries are presumed to follow their instructions is a pragmatic one, rooted less in the absolute certitude that the presumption is true than in the belief that it represents a reasonable practical accommodation of the interests of the state and the defendant and the criminal process." The effectiveness of limiting instruction has also often been questioned. *Cf., Tome v. United States*, 513 U.S. 150, 171 (1995) (Breyer, J., dissenting) (jurors unlikely to follow instructions limiting use of prior inconsistent statements to a rehabilitative purpose rather than for their substantive value); *Honda Motor Co. v. Obert*, 512 U.S. 415, ___ (1994) (concern expressed that jury will not follow

The Court has approved the use of limiting instructions, but only to further either the legitimate truth-finding function or fairness of a trial. *Cf., Romano v. Oklahoma*, 512 U.S. 1, 13 (1994) (admission of evidence in capital case regarding defendant's prior death sentence did not deprive defendant of a fair sentencing proceeding where if the jurors followed the trial court's instruction the evidence should have had little – if any – effect on their deliberations); *Huddleston v. United States*, 485 U.S. 681, 691-92 (1988) (prejudicial effect of relevant similar crimes evidence limited where jury instructed that similar crimes evidence is to be considered only for the limited purpose for which admitted); *Tennessee v. Street*, 471 U.S. 409, 414-416 (1985) (defendant's rights under Confrontation Clause not violated by introduction of accomplice's incriminating confession for purpose of assessing truthfulness of defendant's claim that his own confession was coerced); *Harris v. New York*, 401 U.S. 222 (1971), (statements elicited from a defendant in violation of *Miranda* can be introduced to impeach defendant's credibility, even though statements are inadmissible as evidence of his guilt);[9] *Watkins v. Sonders*. 449 U.S. 341, 347 (1981)

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instruction to limit punitive damages and will, instead return a lawless, biased, or arbitrary verdict); (*Krulewitch v. United States*, 366 U.S. 440, 453 (1949) (Jackson, J., concurring) ("the naive assumption that prejudicial effects can be overcome by instructions to the jury . . . all practicing lawyers know to be a fiction").

[9] Respondent's reliance on *Harris* is clearly misplaced. (Res. Br. 22-23) Harris, by electing to testify on his own behalf, placed his credibility in issue. His confession, which had been elicited in violation of *Miranda*, but which otherwise satisfied legal standards of trustworthiness, was then admitted for the limited

(pretrial hearing not required where the propriety of identification procedures have been questioned and where the reliability of the identification can be tested by cross-examination).

The Court has not approved of the use of instructions to limit the prejudicial effect of "presumptively unreliable" evidence. Admitting such evidence does not further either the legitimate truth-finding function or fairness of a trial. In truly "analogous" situations, the Court has held that "the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored." *Bruton*, 391 U.S., at 135. *See, Jackson v. Denno*, 378 U.S. 368 (1964) (jury could not be relied upon to follow instructions to disregard an involuntary confession); *Burgett v. Texas*, 389 U.S. 109, 115 (1967) (jury could not be relied upon to follow instructions to disregard admission of a prior criminal conviction which is constitutionally infirm).

Given "the practical and human limitations of the jury system," a jury cannot be relied upon to follow an instruction to disregard a redacted confession of a nontestifying codefendant which, directly or indirectly, inculpates a defendant any more than it can be relied upon to

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purpose of impeaching his credibility as a witness. The jury was instructed to consider Harris' confession for that limited purpose. The jury was not instructed, as was the jury in this case, to *disregard* the confession. The "consequences of failure", to disregard an unreliable confession of a codefendant are clearly more "vital" than the "consequences of failure" to limit the use of a defendant's own trustworthy confession. *See, Bruton*, 391 U.S., at 135.

disregard a confession which inculpates the defendant by name. Once the jury has entered "onto the path of inferen[tial]" incrimination, the risk that the jury will not likely obey the instruction to disregard the evidence is substantial.

C. "POLICY CONSIDERATIONS" ALONE DO NOT COMPEL ADMISSION OF A REDACTED CONFESSION OF A NONTESTIFYING CODEFENDANT WHICH, DIRECTLY OR INDIRECTLY, IMPLICATES A DEFENDANT.

Respondent urges the Court to adopt "the facial implication" approach because of several "important policy considerations." (Res. Br. 13-18) According to Respondent, the "facial implication" approach should be adopted because: (1) "whereas facial incrimination is curable by redaction that eliminates references to coparticipants, there is no effective way to redact a confession that is incriminating to the nonconfessing codefendant only when tied to other evidence" (Res. Br. 14); (2) "if a contextual implication approach were used, then a trial judge who is asked to rule on motions to exclude the confession or to sever the trials would be burdened with the task of considering not only the confession itself but other evidence, which typically will not yet have been presented": (Res. Br. 14); (3) "prohibiting the use at joint trials of confessions that are not facially incriminating would result in fewer joint trials, thereby exacting a significant toll on the trial's participants and society as a whole" (Res. Br. 15); and (4) "to forgo the use of codefendant confessions altogether in such situations is too dear a price to pay in view of 'society's compelling interest in

finding, convicting, and punishing those who violate the law.' " (Res. Br. 17)

While these policy considerations are "important", they are far from compelling particularly when balanced against a defendant's constitutional right of confrontation. *Bruton*, 391 U.S., at 135. *See generally*, Judith L. Ritter, *The X-Files: Joint Trials, Redacted Confessions and Thirty Years of Sidestepping Bruton*, 42 Vill. L.Rev.___ (1997).

First, a confession of a nontestifying codefendant *can* be redacted so that it is not incriminating to the defendant in the context of other evidence at trial. Incrimination, not just facial incrimination, is curable by redaction.[10] *See*, Pet. Br. 14 n.15. If a confession is redacted so that is eliminates any reference by the nontestifying codefendant to specific individuals, i.e., Kevin or "deleted", then the confession ordinarily will not be incriminating to the defendant. The confession need not be redacted to eliminate all references to another person, but only to specific, identifiable persons.

Second, a trial judge is often required to consider proffered evidence in context before ruling on its admissibility. *Cf. Williamson*, 512 U.S., at ___ (Whether a statement is self-inculpatory or not can only be determined by viewing it in context); *Bourjaily*, 483 U.S., at 175 (Before

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[10] Under the "facial implication" doctrine, a redacted confession of a nontestifying codefendant, which *in context* clearly and unequivocally implicates a defendant, can be admitted into evidence. As the Maryland Court of Appeals observed, under this approach, "the act of redaction becomes a mere formalistic exercise devoid of the Constitutional protections undergirding *Bruton*. . . . " (J.A. 100)

admitting a coconspirator's statement over an objection that it does not qualify under the coconspirator exception to the hearsay rule, court must be satisfied that the statement actually falls within the definition of the rule and there must be evidence that there was a conspiracy involving the declarant and the nonoffering party and that the statement was made in the course of and in furtherance of the conspiracy). The task is not overly burdensome. In this case, for example, the trial judge simply asked the prosecutor "to tell the Court what you expect your evidence to show, apart from Mr. Bell's statement?" (J.A. 5) The prosecutor then presented a brief summary of the evidence pertaining to the identity of the alleged perpetrators. There was no need for an extensive pretrial hearing.

Third, limiting the use of redacted confessions to those that neither directly, nor indirectly, inculpate the nonconfessing defendant need not result in fewer joint trails. At a joint trial, the prosecution would still be able to use the redacted confession, but only against the defendant who actually confessed. If there is no way to redact a confession, without distorting the significance of the confession with respect to the confessing defendant, then severance would be required.

Finally, to forgo the use at a joint trial of a redacted confession of a nontestifying codefendant which, directly or indirectly, inculpates a defendant is not too dear a price to pay if severance is the only means to insure that both, rather than just one defendant, receives a fair trial. While the Court in *Richardson*, 481 U.S., at 209, indicated a "preference" for the joint trial of defendants, "the Court should be mindful of the serious risks of prejudice and

overreaching that are characteristic of joint trials. . . ." *Zafiro v. United States*, 506 U.S. 534, 545 (1993) (Stevens, J., concurring)

CONCLUSION

For the foregoing reasons the judgment of the Court of Appeals of Maryland should be reversed.

Respectfully submitted,

STEPHEN E. HARRIS
Public Defender of Maryland
ARTHUR A. DELANO, JR.*
NANCY S. FORSTER
Assistant Public Defenders
Counsel for Petitioner
**Counsel of Record*

(8)

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No. 96-8653

In the Supreme Court of the United States

OCTOBER TERM, 1996

KEVIN D. GRAY, PETITIONER

v.

MARYLAND

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

SETH P. WAXMAN
Acting Solicitor General
JOHN C. KEENEY
Acting Assistant Attorney General
MICHAEL R. DREEBEN
Deputy Solicitor General
ROY W. MCLEESE III
Assistant to the Solicitor General
SANGITA K. RAO
Attorney
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

34 pp

QUESTION PRESENTED

Whether the Confrontation Clause of the Sixth Amendment precludes the admission at a joint trial of the confession of a non-testifying co-defendant, where the jury is instructed not to consider the confession against the defendant, and the confession is redacted to replace all incriminating references to the defendant with neutral, non-identifying terms.

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INTEREST OF THE UNITED STATES

This case presents the question whether, under *Bruton* v. *United States*, 391 U.S. 123 (1968), and *Richardson* v. *Marsh*, 481 U.S. 200 (1987), a court may admit at a joint trial the confession of a non-testifying co-defendant, where the jury is instructed not to consider the confession against the defendant, and the confession is redacted to replace all incriminating references to the defendant with neutral, non-identifying terms. The proper application of *Bruton* and *Richardson* is a frequently recurring issue in federal criminal trials, and the United States partici-

pated as amicus curiae in *Richardson*. The Court's resolution of the question presented in this case will have a substantial effect on federal criminal practice.

STATEMENT

1. On November 10, 1993, petitioner and five other young men beat Stacey Williams to death. J.A. 89. Based on information from eyewitnesses to the beat[illegible] the police identified three suspects: Anthony Bell, petitioner Kevin Gray, and Jacquin Vanlandingham. III Tr. 15-16. The police therefore obtained arrest warrants for Bell and petitioner; Vanlandingham had been fatally shot within days of the beating. *Id.* 16-17; J.A. 89.

Bell was arrested first, and he gave a written statement naming himself, Vanlandingham, and petitioner as participants in the beating. J.A. 89. Bell also indicated that "a few other guys," or "[a]bout six guys" in total, were involved in the beating. J.A. 55-56. When petitioner was later arrested, he claimed to have been on the telephone at the time of the beating. III Tr. 38.

Petitioner and Bell were scheduled for a joint trial. J.A. 89. Petitioner moved to sever his trial from Bell's or, in the alternative, to exclude Bell's confession from evidence. J.A. 4-9. The trial court denied the motions, but ordered that Bell's confession be redacted to exclude the names of petitioner and Vanlandingham. J.A. 7-9.

At trial, the State's witness Tracy Brumfield testified that she saw petitioner, Vanlandingham, and ten other young men chasing the victim down the street. J.A. 82-83. State witness Shay Yarberough, who saw the beating itself, gave the following account: Six people were involved in the attack. Vanlandingham lifted the victim over his head and dropped him to the

sidewalk, and petitioner unsuccessfully attempted the same maneuver. Petitioner, Bell, Vanlandingham, and three others repeatedly kicked the victim in the head and body. J.A. 89-90.

Bell did not testify, but his confession was read to the jury with the words "deleted" or "deletion" substituted for the names of petitioner and Vanlandingham. J.A. 10-12. A written copy of the redacted confession was also admitted into evidence, with blank white spaces substituted for the names of petitioner and Vanlandingham. J.A. 65-68. Before the confession was read to the jury, the trial court instructed the jury that the confession was admitted only against Bell and was not to be considered as evidence against petitioner. J.A. 10.

Petitioner testified in his own defense. He claimed that he was on a public phone with his girlfriend during the beating. J.A. 90. Petitioner's girlfriend testified that petitioner had called her from a public telephone and commented to her that Vanlandingham was fighting. *Ibid.* Two other defense witnesses testified that they had witnessed various parts of the beating, and that petitioner was not involved at that time, but was rather at a nearby telephone booth. J.A. 90 (Lamont Matthews); III Tr. 110-112, 116-118 (Renardo Gardner).

The jury found petitioner guilty of involuntary manslaughter. J.A. 90. He was sentenced to ten years' imprisonment with all but seven years suspended. *Ibid.*

2. Petitioner appealed, and the Maryland Court of Special Appeals reversed his conviction. J.A. 87. The court held that the introduction of Bell's redacted confession violated petitioner's Confrontation Clause rights under *Bruton* v. *United States*, 391 U.S. 123

(1968), even though the jury had been instructed not to consider the confession against petitioner. J.A. 83-85. In the court's view, the "instant case represents a point on the continuum between *Bruton* and *Richardson* [v. *Marsh*, 481 U.S. 200 (1987)] 'where one cannot have the requisite degree of assurance that the jury will not improperly consider the evidence in deciding the guilt of the defendant against whom the evidence is not admissible despite a proper limiting instruction.'" J.A. 84 (quoting *Foster* v. *United States*, 548 A.2d 1370, 1378 (D.C. 1988)). The court reasoned that despite the redaction of petitioner's name, "[i]n the context of other evidence * * * the jury need only have taken a short step in inferring that [petitioner] was one of those involved. * * * Therefore, there existed a 'substantial risk' that the jury considered the statement in deciding [petitioner's] guilt." J.A. 83-84.

3. The State of Maryland appealed, and the Court of Appeals of Maryland reinstated petitioner's conviction. J.A. 89. That court ruled that admission of a non-testifying co-defendant's redacted confession violates a defendant's Confrontation Clause rights only if, in the context of all of the evidence introduced at trial, the redacted confession compels a direct inference that the co-defendant originally incriminated the defendant. J.A. 101. The court explained that unless "[t]he compulsion to make the impermissible inference [is] compelling, inevitable, and subject to little or no debate[,] * * * the general and strong presumption that jurors follow their instructions is not overcome, and the requirements of *Bruton* are therefore satisfied." J.A. 101-102.

Applying that test, the court noted that the evidence in the present case established that at least six

individuals were involved in the attack on the decedent. The deleted names in Bell's confession "could have been any one of at least four other individuals[,] a fact emphasized by the State['s] attorney no less than three times during her final summation." J.A. 106. Accordingly, the court held that the evidence at trial did not compel the inference that Bell's confession had named petitioner, and therefore no *Bruton* violation occurred. *Ibid.*

SUMMARY OF ARGUMENT

It is "the almost invariable assumption of the law that jurors follow their instructions." *Shannon* v. *United States*, 512 U.S. 573, 585 (1994) (quoting *Richardson* v. *Marsh*, 481 U.S. 200, 206 (1987)). This Court has applied that principle in a wide variety of contexts, including those in which the instructions at issue required the jury not to consider, or to limit its consideration of, powerfully incriminating evidence. In *Bruton* v. *United States*, 391 U.S. 123 (1968), this Court recognized a narrow exception to that principle. The *Bruton* Court held that a non-testifying co-defendant's confession that on its face powerfully incriminated another defendant could not be admitted at a joint trial. The Court explained that a jury could not be expected to follow an instruction to disregard the facially incriminating confession of the co-defendant in considering the case against the other defendant. 391 U.S. at 126.

In *Richardson*, this Court emphasized that *Bruton* was a "narrow" decision that turned on its "precise facts." 481 U.S. at 207, 211. The Court in *Richardson* declined to extend *Bruton* to exclude co-defendant confessions that had been redacted to eliminate any reference to the name or existence of the defendant.

The Court recognized that, in context with the other evidence admitted at trial, such a co-defendant confession might incriminate the defendant if the jury violated its instructions. When a co-defendant's confession is only contextually incriminating, as opposed to incriminating on its face, however, "there does not exist the overwhelming probability" of the jury's inability to follow a limiting instruction "that is the foundation of *Bruton*'s exception to the general rule." *Id.* at 208. The Court in *Richardson* also emphasized that the "practical effects" of a contrary holding would be intolerable. *Id.* at 208-210.

Richardson's reasoning fully applies to co-defendant confessions that are redacted to replace all incriminating references to another defendant with neutral, non-identifying terms. Such confessions do not have the same immediate and dramatic impact on the jury as a facially incriminating confession such as that at issue in *Bruton*. As in *Richardson*, limiting instructions can be trusted to dissuade jurors from "entering onto the path of inference" to determine whether such confessions would incriminate the other defendant if connected to other evidence at trial. 481 U.S. at 208.

The practical effects of a contrary conclusion would be no more acceptable in the present context than they were in *Richardson*. In *Richardson*, the Court noted that a contextual approach to the admissibility of redacted confessions would make it impossible to determine the admissibility of such confessions until the close of evidence, or would require pretrial hearings that would be burdensome and possibly inadequate in any event. The Court also rejected the alternatives of severance or forgoing use of the co-defendant's confession altogether. The same

considerations apply to confessions redacted to replace the defendant's name with neutral pronouns or deletions. A rule that made the admissibility of such confessions turn on the evidence admitted at trial would make prediction of the admissibility of a confession equally perilous, and pretrial hearings would be no less time-consuming and no more foolproof or feasible. Nor are the alternatives of requiring severance or prohibiting the use of co-defendant confessions at joint trials any more palatable in this context. Accordingly, the balance here should be struck in favor of the general rule that juries follow limiting instructions, just as it was in *Richardson*.

ARGUMENT

ADMISSION OF THE REDACTED CONFESSION OF A CO-DEFENDANT DID NOT VIOLATE PETITIONER'S CONFRONTATION CLAUSE RIGHTS

A. *Bruton* Is A Narrow Exception To The Presumption That Juries Follow The Court's Instructions

1. It is "the almost invariable assumption of the law that jurors follow their instructions." *Shannon* v. *United States*, 512 U.S. 573, 585 (1994) (quoting *Richardson*, 481 U.S. at 206). See also, *e.g.*, *United States* v. *Olano*, 507 U.S. 725, 740 (1993) ("[We] presum[e] that jurors, conscious of the gravity of their task, attend closely the particular language of the trial court's instructions in a criminal case and strive to understand, make sense of, and follow the instructions given them.") (quoting *Francis* v. *Franklin*, 471 U.S. 307, 324 n.9 (1985)).

As this Court explained in *Richardson*, this rule "is a pragmatic one, rooted less in the absolute certitude that the presumption is true than in the

belief that it represents a reasonable practical accommodation of the interests of the state and the defendant in the criminal justice process." 481 U.S. at 211.[1] Accordingly, the Court has adhered to the rule in a wide variety of contexts, including those in which the instructions at issue required the jury not to consider, or to limit its consideration of, powerfully incriminating evidence. For example, in *Harris* v.

[1] Petitioner's amicus, the National Association of Criminal Defense Lawyers, et al. (NACDL), refers in passing to social-science literature generally questioning the ability of jurors to understand and follow instructions. NACDL Amicus Br. 4 n.3. The cited materials do not specifically address the issue in the present case, *i.e.*, the efficacy of limiting instructions in dissuading jurors from considering evidence that, through a chain of inference, could incriminate a defendant. To the extent that amicus NACDL seeks to cast general doubt on the assumption that jurors understand and follow their instructions, this Court has emphasized that rejection of this assumption "would make inroads into th[e] entire complex code of state criminal evidentiary law, and would threaten other large areas of trial jurisprudence." *Spencer* v. *Texas*, 385 U.S. 554, 562 (1967). See also *Gacy* v. *Welborn*, 994 F.2d 305, 313 (7th Cir.) ("[The] presumption that jurors understand and follow their instructions * * * is not a bursting bubble, applicable only in the absence of better evidence. It is a rule of law—a description of the premises underlying the jury system, rather than a proposition about jurors' abilities and states of mind."), cert. denied, 510 U.S. 899 (1993). For this reason, and because of concerns about methodological flaws, courts have questioned whether social-science literature similar to that cited by amicus NACDL is relevant to the proper resolution of particular legal issues. See, *e.g.*, *Free* v. *Peters*, 12 F.3d 700, 704-706 (7th Cir. 1993) (rejecting social-science study purporting to demonstrate that jurors were not able to understand particular Illinois jury instruction; study was methodologically flawed and shed little light on likely performance of real juries), cert. denied, 513 U.S. 967 (1994).

New York, 401 U.S. 222 (1971), the Court held that, if a proper limiting instruction is given, a defendant's credibility may be impeached with statements taken in violation of *Miranda* v. *Arizona*, 384 U.S. 436 (1966), even though such statements are inadmissible as direct evidence of guilt. *Harris* necessarily rests on the view that the jury can be presumed to follow such a limiting instruction, and therefore to use the defendant's own confession solely for impeachment purposes and not as substantive evidence of the defendant's guilt. Accord *Tennessee* v. *Street*, 471 U.S. 409, 414-416 (1985) (jury can be presumed to follow instruction to consider non-testifying co-defendant's confession solely for purpose of assessing defendant's claim that his own confession was coerced).

Similarly, in *Marshall* v. *Lonberger*, 459 U.S. 422, 438 n.6 (1983), and *Spencer* v. *Texas*, 385 U.S. 554, 559-569 (1967), the Court held that juries could be presumed to follow instructions requiring them to consider evidence of a defendant's prior convictions solely in considering sentence enhancement and not in determining guilt or innocence. See also *Watkins* v. *Sowders*, 449 U.S. 341, 347 (1981) (juries could be presumed to follow instructions telling them to disregard inadmissible eyewitness evidence).

Thus, almost without exception, this Court has rejected claims that limiting or cautionary instructions are constitutionally inadequate to protect against the prejudicial potential of evidence placed before the jury in a criminal trial. As this Court stated in rejecting a defendant's claim that juries should not be given a cautionary instruction concerning the defendant's failure to testify: "The petitioner's argument would require indulgence in [the] very doubtful assumption * * * that the jurors will

totally disregard the instruction, and affirmatively give weight to what they have been told not to consider at all. Federal constitutional law cannot rest on [a] speculative assumption[] so dubious as th[is]." *Lakeside* v. *Oregon*, 435 U.S. 333, 340 (1978).[2]

2. In *Bruton*, this Court established a "narrow exception" to the general rule that juries are presumed to follow their instructions. *Richardson*, 481 U.S. at 207. At issue in *Bruton* was a confession by Bruton's co-defendant, Evans. The confession, in which Evans admitted that he and Bruton had committed an armed postal robbery, was admitted into evidence against Evans at a joint trial. 391 U.S. at 124. Although Evans's confession was admissible against Evans as an admission by a party-opponent, Fed. R. Evid. 801(d)(2), it was concededly inadmissible hearsay as to Bruton.[3] 391 U.S. at 128 n.3. Because

[2] The Court has ruled similarly when considering various non-constitutional claims resting on the contention that juries would not follow their instructions. See, *e.g.*, *Shannon* v. *United States*, 512 U.S. at 584 (jury can be presumed to follow instruction not to consider possible punishment when reaching verdict, even where insanity defense has been raised); *United States* v. *Olano*, 507 U.S. at 740 (jury can be presumed to have followed instruction that alternates not participate in deliberations); *Zafiro* v. *United States*, 506 U.S. 534, 539, 540-541 (1993) (in context of defense motions to sever pursuant to Fed. R. Crim. P. 14, "limiting instructions[] often will suffice to cure any risk of prejudice").

[3] Confessions made by a non-testifying co-defendant may in some circumstances be admissible against both the co-defendant and other defendants. See *Williamson* v. *United States*, 512 U.S. 594, 603 (1994) (self-incriminating portions of confessions may be admissible as statements against penal interest, Fed. R. Evid. 804(b)(3)); *Cruz* v. *New York*, 481 U.S. 186, 193-194 (1987) (non-testifying co-defendant's confession might be admissible against defendant in some circumstances). In the present case, as in *Bruton*, no argument was made that the non-testifying co-defendant's confession was admissible, in whole or in part, against the complaining defendant.

Evans did not testify at trial, the admission of his confession against Bruton would have violated Bruton's rights under the Confrontation Clause of the Sixth Amendment, made applicable to the States through the Fourteenth Amendment. *Richardson*, 481 U.S. at 206.

In an effort to avoid any Confrontation Clause problem, the trial court instructed the jury that it could consider Evans's confession solely against Evans, and that it should disregard the confession in determining Bruton's guilt or innocence. *Bruton*, 391 U.S. at 125 & n.2. Applying the presumption that the jury followed the limiting instruction, "no question would [have] arise[n] under the Confrontation Clause, because by hypothesis the case [would have been] treated as if the confessor made no statement inculpating the nonconfessor." *Bruton*, 391 U.S. at 126. The Court held in *Bruton*, however, that

> there are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored. Such a context is presented here, where the powerfully incriminating extrajudicial statements of a codefendant, who stands accused side-by-side with the defendant, are deliberately spread before the jury in a joint trial.

Id. at 135-136 (citations omitted). In that context, the Court concluded that it could not "accept limiting

instructions as an adequate substitute for [Bruton's] constitutional right of cross-examination." *Id.* at 137. The Court therefore reversed Bruton's conviction.[4] *Ibid.*

Bruton did not cast doubt on the general rule that juries are presumed to follow their instructions. To the contrary, the Court "agree[d] that there are many circumstances in which this reliance [on the rule that jurors are presumed to follow their instructions] is justified." 391 U.S. at 135. The Court's subsequent decisions have confirmed the narrow scope of the decision in *Bruton*. See pp. 7-10, *supra*. In one of those decisions, moreover, the Court specifically noted that the "assumption that jurors are able to follow the court's instructions fully applies when rights guaranteed by the Confrontation Clause are at issue." *Street*, 471 U.S. at 415 n.6. The most important illustration of the limited nature of the holding in *Bruton*, however, is this Court's decision in *Richardson*.

3. *Richardson* involved an armed robbery and double murder committed by three people: Marsh, Williams, and Martin. *Richardson*, 481 U.S. at 202.

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[4] *Bruton* relied heavily on *Jackson* v. *Denno*, 378 U.S. 368 (1964), in which the Court held unconstitutional the practice of leaving to the jury the question whether a defendant's confession was involuntary. *Jackson*, like *Bruton*, turned on the Court's concern that limiting instructions might be inadequate in a specific context to prevent juries from considering powerfully incriminating evidence. See *Watkins* v. *Sowders*, 447 U.S. at 347 ("The Court in *Jackson* did reject the usual presumption that a jury can be relied upon to determine issues according to the trial judge's instructions, but the Court did so because of the peculiar problems the issue of the voluntariness of a confession presents.").

Marsh and Williams were tried together. Williams had made a post-arrest statement implicating all three participants. At trial, Williams declined to testify, but his confession was admitted into evidence with a limiting instruction that it was not to be considered against Marsh. The confession was also redacted to eliminate any reference to Marsh's existence or her role in the crime. *Id.* at 203. Nonetheless, when linked to other evidence introduced at trial, the confession incriminated Marsh as to the critical element of intent.[5] *Id.* at 206. The Sixth Circuit reversed Marsh's conviction, holding that "in determining whether *Bruton* bars the admission of a nontestifying codefendant's confession, a court must assess the confession's 'inculpatory value' by examining not only the face of the confession, but also all of the evidence introduced at trial." *Id.* at 205-206 (citing *Marsh* v. *Richardson*, 781 F.2d 1201, 1212 (6th Cir. 1986)).

This Court reversed, specifically rejecting the Sixth Circuit's "contextual implication" or "evidentiary linkage" approach to the resolution of *Bruton* questions. 481 U.S. at 206-211. The Court first explained that the decision in *Bruton* represented only a "narrow exception" to the principle that jurors follow their instructions. *Id.* at 207. The confession in *Richardson* fell "outside th[at] narrow exception,"

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[5] Williams's confession described a conversation Williams had with Martin as they drove to the scene of the crime, during which Martin said that he would have to kill the victims after the robbery. Although the redacted confession did not mention that Marsh was also in the car during this time, Marsh took the stand and testified that she was in the back seat of the car as the three of them drove to the scene of the crime. *Richardson*, 481 U.S. at 204.

because it "was not incriminating on its face, and became so only when linked with evidence introduced later at trial." *Id.* at 208.

As the Court explained, "[s]pecific testimony that 'the defendant helped me commit the crime' is more vivid than inferential incrimination, and hence more difficult to thrust out of mind." 481 U.S. at 208. In contrast, "with regard to inferential incrimination the judge's instruction may well be successful in dissuading the jury from entering onto the path of inference in the first place, so that there is no incrimination to forget." *Ibid.* Thus, "[w]here the necessity of [inferential] linkage is involved, it is a less valid generalization that the jury will not likely obey the instruction to disregard the evidence." *Ibid.* The Court concluded that, "[i]n short, while it may not always be simple for the members of a jury to obey the instruction that they disregard an incriminating inference, there does not exist the overwhelming probability of their inability to do so that is the foundation of *Bruton*'s exception to the general rule." *Ibid.*

The Court in *Richardson* also emphasized that its conclusion rested significantly on the "practical effects" of adopting a "contextual implication" approach. 481 U.S. at 208-210. The Court's main concern was that adopting such an approach would make it impossible "to predict the admissibility of a confession in advance of trial," since the trial judge would presumably be obliged to "assess at the end of each trial whether, in light of all of the evidence, a nontestifying codefendant's confession has been so 'powerfully incriminating' that a new, separate trial is required for the defendant." *Id.* at 209. Such an approach "obviously lends itself to manipulation by

the defense—and even without manipulation will result in numerous mistrials and appeals." *Ibid.* Moreover, pretrial hearings to attempt to predict the outcome of a "contextual implication" analysis would be "time consuming and obviously far from foolproof," and would require that the prosecution and the defense reveal the evidence they planned to introduce at trial, a procedure that was of doubtful feasibility in light of the limited scope of pretrial discovery under the Federal Rules of Criminal Procedure. *Ibid.*

The Court also rejected as unacceptably costly two other ways of avoiding the risks of reversal under a "contextual implication" approach: requiring severance in all cases involving a confession by one of the defendants, or prohibiting the use of co-defendant confessions at joint trials. 481 U.S. at 209-210. Joint trials, the Court pointed out, "play a vital role in the criminal justice system."[6] *Id.* at 209. The cost of prohibiting the use of co-defendant confessions would also be "too high, since confessions 'are more than

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[6] As the Court explained,

> It would impair both the efficiency and the fairness of the criminal justice system to require, in all these cases of joint crimes where incriminating statements exist, that prosecutors bring separate proceedings, presenting the same evidence again and again, requiring victims and witnesses to repeat the inconvenience (and sometimes trauma) of testifying, and randomly favoring the last-tried defendants who have the advantage of knowing the prosecution's case beforehand. Joint trials generally serve the interests of justice by avoiding inconsistent verdicts and enabling more accurate assessment of relative culpability—advantages which sometimes operate to the defendant's benefit.

481 U.S. at 210.

merely "desirable"; they are essential to society's compelling interest in finding, convicting, and punishing those who violate the law.'" *Id.* at 210 (quoting *Moran* v. *Burbine*, 475 U.S. 412, 426 (1986)).

B. *Bruton*'s Narrow Exception Should Not Be Extended To Confessions That Have Been Redacted To Replace All Incriminating References To The Defendant With Neutral, Non-Identifying Terms

The issue in this case is one the Court expressly left open in *Richardson*, 481 U.S. at 211 n.5: whether the narrow exception created in *Bruton* extends to cases in which a non-testifying co-defendant's confession has been redacted to replace all incriminating references to the defendant with neutral, non-identifying terms. *Richardson* makes clear that the resolution of this issue turns on the balance between two factors: the risk that a jury would disregard a proper limiting instruction, and the "practical effects" of a rule that would hold such redaction insufficient. 481 U.S. at 208, 211. See also *Street*, 471 U.S. at 415 ("[T]he question is * * * whether, in light of the competing values at stake, we may rely on the crucial assumption that the jurors followed the instructions given them by the trial judge.") (internal quotation marks omitted). The balance should be struck here as it was in *Richardson*. A non-testifying co-defendant's confession redacted to replace all incriminating references to the defendant with neutral, non-identifying terms is admissible at a joint trial, because it does not create an "overwhelming probability" that a jury would disregard a limiting instruction, and the "practical effects" of adopting a

"contextual implication" approach would be as unacceptable as they were in *Richardson*.[7]

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[7] That is the view of the overwhelming majority of the federal courts of appeals. See *United States* v. *Williams*, 936 F.2d 698, 700-701 (2d Cir. 1991); *United States* v. *Vogt*, 910 F.2d 1184, 1191-1192 (4th Cir. 1990), cert. denied, 498 U.S. 1083 (1991); *United States* v. *Jimenez*, 77 F.3d 95, 98-99 (5th Cir. 1996); *United States* v. *Sherlin*, 67 F.3d 1208, 1215-1216 (6th Cir. 1995), cert. denied, 116 S. Ct. 795, 1548 (1996); *United States* v. *Banks*, 78 F.3d 1190, 1200 (7th Cir.), cert. granted, vacated, and remanded on other grounds, *sub nom. Mills* v. *United States*, 117 S. Ct. 478 (1996), aff'd on remand, No. 94-2788, 1997 WL 450074 (7th Cir. Aug. 8, 1997); *United States* v. *Jones*, 101 F.3d 1263, 1269-1270 (8th Cir. 1996), cert. denied, 117 S. Ct. 1346, 1566 (1997); *United States* v. *Hoac*, 990 F.2d 1099, 1105-1106 (9th Cir. 1993), cert. denied, 510 U.S. 1120 (1994); *United States* v. *Green*, 115 F.3d 1479, 1483-1486 (10th Cir. 1997), petition for cert. pending, No. 97-5829. Two of these circuits, however, generally insist that redaction be performed in such a way that the jury would not realize that the confession had been redacted. See, *e.g.*, *United States* v. *Long*, 900 F.2d 1270, 1280 (8th Cir. 1990); *United States* v. *Alvarado*, 882 F.2d 645, 653 (2d Cir. 1989), cert. denied, 493 U.S. 1071 (1990). See also pp. 21-22 n.11, *infra*. The D.C. Circuit and the First Circuit have expressly described the issue as open. See *United States* v. *Applewhite*, 72 F.3d 140, 145-146 (D.C. Cir. 1995), cert. denied, 116 S. Ct. 1864 (1996); *United States* v. *Smith*, 46 F.3d 1223, 1228 n.1 (1st Cir.), cert. denied, 116 S. Ct. 176 (1995). The Third Circuit does not appear to have addressed the question since *Richardson* was decided, although a pre-*Richardson* case decided by that court sitting in banc rejected a "contextual implication" approach. *United States* v. *Belle*, 593 F.2d 487, 494 ("In short, evidentiary linkage or contextual implication may not be utilized to convert a non-*Bruton* admissible statement into a *Bruton* inadmissible statement."), cert. denied, 442 U.S. 911 (1979). Only the Eleventh Circuit has explicitly adopted a form of "contextual implication" analysis, holding that a redacted confession that refers to other defendants only through the use of neutral, non-identifying terms will violate

1. The confession at issue in *Bruton* directly and expressly incriminated the complaining defendant. *Bruton* turns critically on the concern that jurors cannot reasonably be expected to "thrust out of mind" such "vivid" and "powerfully incriminating" evidence when assessing the guilt of the complaining defendant. *Richardson*, 481 U.S. at 208. The confession at issue in *Richardson*, in contrast, made no reference to the complaining defendant, and incriminated her only when considered in connection with other evidence introduced at the trial. *Ibid.* In that context, the Court held, a limiting instruction "may well be successful in dissuading the jury from entering onto the path of inference in the first place." *Ibid.* Confessions in which all incriminating references to the complaining defendant are replaced with neutral, non-identifying terms are comparable in effect to the confession at issue in *Richardson*.[8]

Bruton if other evidence "compels a direct implication of the complaining defendant[s]." *United States* v. *Tapia*, 59 F.3d 1137, 1142 n.5 (internal quotation marks omitted), cert. denied, 116 S. Ct. 401, 546 (1995). A recent decision, however, suggests that the Eleventh Circuit's position with respect to "contextual implication" may not be entirely clear. See *United States* v. *Adams*, 74 F.3d 1093, 1098-1099 (1996) (in case where non-testifying co-defendant's confession contained express reference to defendant Adams, but reference was not facially incriminating, no *Bruton* error; "No *Bruton* violation occurred because the statement was not facially incriminating. It was not facially incriminating because the reference to the bank account required linkage to other evidence.").

[8] Amicus NACDL suggests that confessions redacted in that way might still be easily connected to the complaining defendant, because they might contain incriminating references to him in the form of initials, nicknames, or physical descriptions. Br. 11 (citing *Harrington* v. *California*, 395 U.S.

Such confessions do not have the immediate and dramatic impact of a facially incriminating confession. Rather, before a jury could use such a confession to incriminate a complaining defendant, the jury would have to review the confession's descriptions of the conduct of the unidentified person or persons, compare those descriptions with the testimony of other witnesses about what the complaining defendant said and did, and determine whether and to what extent the actions of any of the unidentified persons recounted in the confession coincide with the evidence about the role of the complaining defendant. Refraining from that form of deductive reasoning is no more difficult than the task demanded of jurors by many limiting instructions.[9] As in *Richardson*, there

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250, 253 (1969) (assuming *Bruton* violation where confessions of non-testifying co-defendants referred to defendant not by name, but as "white guy," and described defendant's age, height, weight, and hair color)). The lower courts have been alert to that concern, however, and in general have appropriately required that all references that readily identify and incriminate the complaining defendant—including names, nicknames, initials, and physical descriptions—be replaced with neutral, non-identifying terms. See, *e.g.*, *United States* v. *Kreiser*, 15 F.3d 635, 639 (7th Cir. 1994) ("Simply put, there is no *Bruton* problem when the substitution—here, the word 'source'—does not identify the nonconfessing codefendant by race, age, size, or any other means except (though not relevant here) gender.").

[9] Even where the inference is relatively obvious, jurors cannot draw it without speculating about the identities of unnamed actors or filling in the blanks of the confession, and, contrary to their instructions, then applying that "restored" confession in considering the case against the defendant. In any event, often, as here, such lines of inference would be quite unrewarding. Although Bell's redacted confession would have permitted the jury to conclude that Bell had named at least

is therefore no sufficient reason to believe that a limiting instruction will prove inadequate to dissuade jurors from engaging in that analytical process.[10]

Redacted confessions that are not facially incriminating differ from the confession at issue in *Bruton* in another critical respect. In *Bruton*, the Court was concerned that a jury would be unable to follow a limiting instruction that required it simultaneously to consider a confession to determine the guilt of one defendant but ignore it as to another defendant whom it directly and powerfully incriminated. 391 U.S. at 131 ("A jury * * * cannot determine that a confession is true insofar as it admits that A has committed criminal acts with B and at the same time effectively ignore the inevitable conclusion that B has committed

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some specific people who participated with him, the actions attributed to those people did not coincide in any distinctive way with the government's evidence against petitioner. More generally, the issue for the jury in this case was whether it should believe the government witnesses, who identified petitioner as one of the individuals involved in the beating, or the defense witnesses, who placed him elsewhere. The jury would have had no way of knowing whether Bell named petitioner as one of those individuals—thus giving an account consistent with the testimony of the government witnesses—or whether he did not—thus giving an account consistent with the testimony of the defense witnesses.

[10] A different conclusion might obtain if a prosecutor directly informed the jury, for example in closing argument, that a redacted confession had originally named the defendant. Cf. *Richardson*, 481 U.S. at 211. Contrary to the belated assertion of petitioner and his amicus (Pet. Br. 17; NACDL Amicus Br. 13-14), nothing of the sort occurred in the present case. In the disputed remark, to which no objection was made, the prosecutor simply summarized the evidence against petitioner and Bell; she did not explicitly suggest that Bell's confession originally named petitioner. IV Tr. 123.

those same criminal acts with A.") (quoting *People* v. *Aranda*, 407 P.2d 265, 272 (Cal. 1965)). No comparable problem exists with respect to redacted confessions that are not facially incriminating. In this case, for example, the jury could easily use Bell's confession to determine Bell's guilt without attempting to determine whether, considered in light of the other trial evidence, that confession might have implications for petitioner.

For these reasons, confessions that are not facially incriminating do not present the "overwhelming probability" that jurors could not follow a limiting instruction that was the basis of the ruling in *Bruton*. *Richardson*, 481 U.S. at 208. See, *e.g.*, *United States* v. *Banks*, 78 F.3d 1190, 1199-1200 (7th Cir.) ("[T]hese nonspecific references to other, nameless actors do not present the type of 'facially incriminating' references that the Supreme Court found in *Bruton* to warrant a departure from the general presumption that juries follow their limiting instructions."), cert. granted, vacated, and remanded on other grounds *sub nom. Mills* v. *United States*, 117 S. Ct. 478 (1996), aff'd on remand, No. 94-2788, 1997 WL 450074 (7th Cir. Aug. 8, 1997).[11]

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[11] In arguing that redactions that replace all incriminating references are inadequate, petitioner and his amicus focus primarily on redactions that use substitute neutral terms such as "deleted," thereby alerting the jury that names have been redacted from the non-testifying co-defendant's confession. Pet. Br. 15; NACDL Amicus Br. 11-12, 14-15. Petitioner is not in a position to complain about that aspect of the redaction of Bell's confession. The trial court made clear its willingness to redact the confession in this case to remove all references to petitioner, and invited petitioner to make suggestions about the manner of the redaction. 6/17/94 Tr. 52. Although petitioner

2. The holding in *Richardson* also reflects the Court's conclusion that making the admissibility of redacted confessions turn on the evidence admitted at trial would have unacceptable "practical effects." 481 U.S. at 208-210. The practical costs of a contextual approach are equally unacceptable in the present setting.

In some cases, a non-testifying co-defendant's confession can appropriately be redacted to remove any references to the actions of other defendants. Often,

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objected generally to the admission of the confession, even in redacted form (I Tr. 33-35; IV Tr. 133), he never suggested that the redaction was problematic because it indicated to the jury that redaction had occurred.

More generally, although accomplishing redaction in a way that is not apparent to the jury may be desirable and feasible in some circumstances, it will not always be. For example, such redaction may be infeasible in cases involving audiotaped or videotaped statements. In any event, the mere fact that the jury would be aware that redaction has occurred does not create an "overwhelming probability" that the jury would disregard a limiting instruction. See, *e.g.*, *United States* v. *Applewhite*, 72 F.3d 140, 145-146 (D.C. Cir. 1995) (no *Bruton* violation although jury was aware that non-testifying co-defendant's confession had been redacted to remove name of confederate, and other pieces of evidence permitted inference that redacted name was defendant's), cert. denied, 116 S. Ct. 1864 (1996). Although some courts have thought it important to prevent the jury from realizing that redaction has occurred, see, *e.g.*, *United States* v. *Long*, 900 F.2d 1270, 1280 (8th Cir. 1990), it is not apparent why the likelihood of jury speculation about the identity of unnamed persons would turn materially on whether the confession was originally ambiguous or subsequently redacted. Any remaining concern about the jury's knowledge of the redaction could be addressed by a instruction specifically directing the jury not to speculate about the reasons for the redaction.

however, such redaction would render the redacted confession confusing or even misleading.[12] In this case, for example, it is difficult to imagine how Bell's confession could have been redacted to remove all incriminating references to anyone other than Bell without leaving the confession unintelligible or potentially misleading as to Bell's involvement. That may be why amicus NACDL—although professing adherence to a rule flatly prohibiting references to anyone other than the declarant—does not attempt to perform such a redaction on Bell's confession in this case, instead proposing a redaction that includes numerous incriminating references to others, and simply uses plural pronouns (such as "we") rather than "deleted" or "deletion." NACDL Amicus Br. 16-18, App. A1-A2.

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[12] See, *e.g.*, *United States* v. *Strickland*, 935 F.2d 822, 826 (7th Cir.) ("For example, under the defendants' rule, neutral pronouns could not be substituted for a declarant's repeated references to his cohorts even where, as here, the omission of such pronouns would render the statement meaningless—indeed, the more detailed and incriminating the statement, the more meaningless it would become."), cert. denied, 502 U.S. 917 (1991); *United States* v. *Myers*, 892 F.2d 642, 647-648 (7th Cir. 1990) ("Deleting all reference to another person would have made [the non-testifying co-defendant's] statement confusing, in light of the evidence that he did not act alone. Perhaps in some cases the reference could be deleted without confusion, and if so that might be the better course; it would not have been here."); *United States* v. *Washington*, 952 F.2d 1402, 1404 (D.C. Cir. 1991) (redaction of non-testifying co-defendant's confession would violate rule of completeness, Fed. R. Evid. 106, "if the redacted version 'distorts the meaning of the statement or excludes information substantially exculpatory of the [non-testifying co-defendant.]'") (quoting *United States* v. *Kaminski*, 692 F.2d 505, 522 (8th Cir. 1982)), cert. denied, 503 U.S. 1009 (1992).

These recurring concerns both explain and justify the widespread practice in the federal courts of redacting confessions to retain references to the conduct of other defendants but to remove the names of, and other identifying incriminating references to, other defendants. In cases where such redactions are used, the practical costs of adopting a "contextual implication" approach would be identical to those found too high in *Richardson*. A contextual approach would make prediction of the admissibility of a confession equally perilous, and pretrial hearings would be no less time-consuming and no more foolproof or feasible. Nor are the alternatives of severance or prohibiting the use of co-defendant confessions at joint trials any more palatable here than in *Richardson*.[13]

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[13] Amicus NACDL refers in passing to the possibility of using multiple juries to try a single case. Br. 16. That suggestion was made to the Court in *Richardson* (Resp. Br. at 44) (No. 85-1433), and was implicitly rejected as an adequate alternative. Federal and state courts have generally been quite skeptical about that relatively untried technique. See, *e.g.*, *United States* v. *Balter*, 91 F.3d 427, 434-435 n.2 (3d Cir.) (technique is "costly and unwieldy"), cert. denied, 117 S. Ct. 517, 518 (1996); *United States* v. *Rimar*, 558 F.2d 1271, 1273 (6th Cir.) (technique resulted in "instances of confusion," including "misstatements of the judge or defense counsel in referring to the attorneys or their clients by the wrong names, or confusing momentarily which jury was sitting in which case," and "the trial took somewhat longer than the nature of the charges might suggest was necessary"), cert. denied, 434 U.S. 984 (1977) & 435 U.S. 922 (1978); *Ewish* v. *State*, 871 P.2d 306, 313-314 (1994) ("The case at hand illustrates that the device can become a breeding ground for confusion in process and results alike. What should have been a relatively simple trial took four weeks to conduct in the lower court. * * * The length of the trial, the curious results of the verdicts, and the length of this appeal indicate that the multiple jury process should be engaged with great caution."), rev'd in part on other grounds on rehearing, 904 P.2d 1038 (Nev. 1995); *State* v. *Corsi*, 430 A.2d 210, 213 (N.J. 1981) ("The reason for the lack of widespread adoption of this technique [*i.e.*, the use of multiple juries] would appear to be the belief that application of appropriate safeguards necessary to protect the rights of defendants in such a trial would be more time consuming than if separate trials were ordered. In addition, inherent in such a complicated procedure is the greatly enhanced possibility of error. It seems clear, therefore, that such procedure remains the rare exception rather than the rule.").

3. Perhaps because a "contextual implication" approach cannot be squared with *Richardson*, amicus NACDL proposes instead a bright-line rule that it contends would be easy to administer: Any use of a redacted confession that refers to the existence of a defendant other than the declarant offends the Confrontation Clause. NACDL Amicus Br. 16-18. That proposal is without merit.

It is difficult to tell precisely what amicus NACDL is advocating. On one hand, amicus NACDL says that what is required is redaction that "eliminate[s] any reference to the co-defendant." NACDL Amicus Br. 18. On the other hand, amicus NACDL states that the trial court could properly have redacted Bell's confession so as to leave intact references to petitioner, so long as those references were found only in plural pronouns. *Id.* at 18, App. A1-A2.[14]

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[14] Amicus NACDL's suggestion that the redaction it proposes would have solved any Confrontation Clause problem directly contradicts the position taken by petitioner in the trial court. 6/17/94 Tr. 46, 53-55 (counsel for petitioner opposes admission of confession in redacted form, arguing that severance or exclusion was required if there was any reference to fact that group was involved in beating).

However amicus NACDL's rule is understood, it is foreclosed by *Richardson*. Amicus NACDL admits that its rule would require courts to find Confrontation Clause violations even in cases where "the likelihood that a jury will draw an inculpatory link between the accused and a co-defendant's confession is remote." NACDL Amicus Br. 19. *Richardson*, however, held that the admission of a non-testifying co-defendant's confession will violate the Confrontation Clause rights of a defendant only if there is an "overwhelming probability" that jurors will be unable to follow an instruction requiring that they consider the confession only against the declarant. 481 U.S. at 208.

The proposal of amicus NACDL amounts to a broad prophylactic rule, to be imposed upon the States as a matter of federal constitutional law, that would often be impossible to meet without rendering confessions confusing, misleading, or meaningless. The effect therefore would be to require severance (or prohibition of the use of co-defendant confessions) in many cases, to ensure against potential Confrontation Clause violations in a few. *Richardson* makes clear that the costs of such an approach are "too high." 481 U.S. at 210.[15] See also *United States* v. *Strickland*,

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[15] Amicus NACDL suggests that the unacceptable consequences of the rule it proposes could be mitigated through application of the harmless-error doctrine. Br. 19-20. Application of that doctrine, however, would do little to reduce the untoward effects of the proposed rule. The harmless-error doctrine would permit an appellate court to affirm if a trial court failed to apply the proposed prophylactic rule but there was no real threat to the defendant's Confrontation Clause rights. It would not, however, reduce the unacceptable costs that would be imposed when trial courts complied with the

935 F.2d 822, 825-826 (7th Cir.) ("Defendants proffer a rule whereby a nontestifying codefendant's statement should always be redacted to omit any and all references to codefendants on trial. * * * Such a rule, while easy to apply, would unduly handcuff the government's ability to introduce admissible confessions and statements against a declarant in a joint trial."), cert. denied, 502 U.S. 917 (1991).

4. In sum, the logic of *Richardson* compels the conclusion that the Confrontation Clause is not violated by the admission at a joint trial of a non-testifying co-defendant's confession that has been redacted to replace all incriminating references to other defendants with neutral, non-identifying terms. Confessions that are redacted in this way are not facially incriminating. Rather, they become so only if the jury draws inferences, based on other evidence at trial, to surmise the identity of unnamed persons who are discussed in the co-defendant's confessions. Whether those inferences are subtle or obvious, juries can be trusted to comply with instructions directing them to consider such confessions only against the declarant and not to use such a reconstructed confession against the other defendant.[16]

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prophylactic rule and unnecessarily ordered severance or prohibited the use of co-defendant confessions.

[16] Although it affirmed petitioner's conviction, the Maryland Court of Appeals adopted a "contextual implication" approach, holding that *Bruton* would be violated if, in the context of the other evidence at trial, a redacted confession gave rise to a "compulsion to make the impermissible inference" that was "compelling, inevitable, and subject to little or no debate." J.A. 101. The Maryland Court of Special Appeals also adopted a "contextual implication" approach, but chose a looser formulation, holding that *Bruton* is violated if there is a

CONCLUSION

The judgment of the Court of Appeals of Maryland should be affirmed.

Respectfully submitted.

SETH P. WAXMAN
Acting Solicitor General
JOHN C. KEENEY
Acting Assistant Attorney General
MICHAEL R. DREEBEN
Deputy Solicitor General
ROY W. MCLEESE III
Assistant to the Solicitor General
SANGITA K. RAO
Attorney

SEPTEMBER 1997

"substantial risk" that the jury would draw an incriminating inference from the redacted confession, considered in light of the other evidence at trial. J.A. 83. For the reasons stated in text, both variants are incompatible with the logic of *Richardson*. The looser formulation adopted by the Court of Special Appeals, however, is particularly untenable. *Richardson* held that the rule of *Bruton* applies only where there is an "overwhelming probability" that the jury could not follow a limiting instruction. 481 U.S. at 208. See also *Greer* v. *Miller*, 483 U.S. 756, 766 n.8 (1987). In light of that holding, any "contextual implication" approach would necessarily be limited to cases in which the context essentially compelled the jury to connect the redacted confession with the complaining defendant. See, *e.g.*, *United States* v. *Applewhite*, 72 F.3d 140, 145 (D.C. Cir. 1995) ("[T]he logic of *Richardson* precludes application of *Bruton* 'to a codefendant's redacted statement that is less incriminating than one that creates an inevitable association.'") (quoting *United States* v. *Washington*, 952 F.2d 1402, 1406 (D.C. Cir. 1991), cert. denied, 503 U.S. 1009 (1992)), cert. denied, 116 S. Ct. 1864 (1996).

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No. 96-8653

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1996

KEVIN D. GRAY,
Petitioner,
v.

STATE OF MARYLAND,
Respondent.

On Writ of Certiorari to the
Court of Appeals of Maryland

BRIEF FOR THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, THE PUBLIC DEFENDER SERVICE FOR THE DISTRICT OF COLUMBIA, AND THE NATIONAL LEGAL AID AND DEFENDER ASSOCIATION, AS AMICUS CURIAE IN SUPPORT OF PETITIONER

DAVID REISER*
451 Indiana Avenue, N.W.
Washington, D.C. 20001
(202) 628-1200

BARBARA E. BERGMAN
1117 Stanford, N.E.
Albuquerque, NM 87131
(505) 277-3304

*Counsel of Record

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INTERESTS OF AMICI CURIAE[1]

Amici are two national membership organizations and an organization that provides representation to indigent persons accused of crime in the District of Columbia, each of which has an interest in preserving the right of cross-examination in criminal cases.[2]

The National Association of Criminal Defense Lawyers ("NACDL") is a nationwide, non-profit voluntary association of criminal defense lawyers founded in 1958 with a membership of more than 9,000 attorneys. The NACDL is affiliated with 68 state and local criminal defense organizations with which it works cooperatively on issues related to criminal law and procedure, and thus, it speaks for more than 28,000 criminal defense lawyers nationwide.

The Public Defender Service for the District of Columbia was established by Congress in 1970 to provide representation to persons unable to afford counsel in criminal and delinquency cases in the District of Columbia. PDS served as counsel for the defendant in *Foster v. United States,* 548 A.2d 1370 (D.C. 1988), a decision holding that the court should consider other evidence in determining whether admission of a co-defendant's confession violates the Confrontation Clause.

The National Legal Aid and Defender Association ("NLADA") is a private, non-profit, national membership organization, founded in 1911. Its membership includes the majority of public defender offices, coordinated assigned

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[1] In accordance with Rule 37.6 of this Court, amici curiae represent that no party other than counsel for amici authored this brief in whole or in part, and no person or entity, other than amici, has made a monetary contribution to the preparation or submission of this brief.

[2] Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Supreme Court Rule 37.3.

counsel systems, and legal services agencies around the nation. Its membership is comprised of approximately 3,000 offices which provide civil and criminal legal services to poor people. NLADA's primary purpose is to assist in providing effective legal services to persons unable to retain counsel.

SUMMARY OF ARGUMENT

The goal of the Confrontation Clause is to assure that evidence in a criminal case passes through a crucible of adversary testing. If evidence cannot be tested by cross-examination, it is inadmissible unless it possesses indicia of reliability that have stood the test of time or that satisfy the court in the place of cross-examination. The custodial statements of a person arrested and charged with murder about the involvement of others are not admissible without an opportunity for cross-examination, because they are so untrustworthy. "[T]he arrest statements of a codefendant have traditionally been viewed with special suspicion. Due to his strong motivation to implicate the defendant and to exonerate himself, a codefendant's statements about what the defendant said or did are less credible than ordinary hearsay evidence." *Williamson v. United States*, 512 U.S. 594, 601 (1994) (quoting *Lee v. Illinois*, 476 U.S. 530, 541 (1986)).

In *Bruton v. United States*, 391 U.S. 123 (1968), this Court recognized that instructions to disregard a co-defendant's statement are not sufficient to protect the accused against the danger of conviction based upon untrustworthy evidence of this type, if the statement is admitted in a joint trial. It often will be possible to redact a statement to remove any reference to the co-defendant, thereby preserving the availability of the statement against the person who made it without putting the co-defendant at risk. In this case, however, the deletions did

nothing to shield Kevin Gray from the incriminating import of his co-defendant's statement. The prosecutor's presentation of evidence and rebuttal summation assured that the jury would have no doubts whatsoever about whether Gray's co-defendant had named him as a participant in the crime.

A principled and workable line can be drawn between the complete redaction of any reference to a co-defendant, as in *Richardson v. Marsh*, 481 U.S. 200 (1987), and an incomplete redaction such as the one presented to the jury here. The "deletions" in this case were red flags that invited the jury's attention and speculation. Yet the co-defendant's statement could easily have been redacted to eliminate any reference to Gray without disadvantaging the prosecution of the co-defendant or distorting the statement's meaning. Given this alternative, the extreme risk that the jury, knowing that the co-defendant had named Gray, would use the evidence against Gray, as well, was unacceptable under *Bruton*. There will be cases in which the prejudicial effect of a co-defendant's statement is slight, but these *de minimis* cases should be treated under the harmless-error doctrine, rather than by diluting the protections of the Confrontation Clause. In this case, the error was prejudicial, requiring reversal of Gray's conviction.

ARGUMENT

A PRINCIPLED AND PRACTICAL LINE CAN BE DRAWN BETWEEN CONFESSIONS THAT PLAINLY INCRIMINATE A CO-DEFENDANT, DESPITE THE REDACTION OF THE CO-DEFENDANT'S NAME, AND CONFESSIONS REDACTED TO ELIMINATE ANY REFERENCE TO THE CO-DEFENDANT.

In *Bruton v. United States*, 391 U.S. 123, 136 (1968), this Court held that the admission of a co-defendant's

confession "posed a substantial threat to petitioner's right to confront the witnesses against him," in violation of the Sixth Amendment, notwithstanding a limiting instruction to the jury to use the confession as evidence only against the defendant who made it, and not against Bruton. *Bruton* rests on two fundamental propositions. *First,* a jury is likely to be swayed by a defendant's hearsay statements incriminating a co-defendant. *Douglas v. Alabama,* 380 U.S. 415 (1965). *Second,* a cautionary instruction will not effectively prevent the jury from making incriminatory use of evidence as powerful as a confession. *Jackson v. Denno,* 378 U.S. 368 (1964). The Court in *Bruton* concluded that jurors often would be unable to follow an instruction to consider a confession only as evidence against the person who made it, and instead, would allow the confession to influence deliberations against a jointly-tried co-defendant as well. The *Bruton* rule is grounded in "the practical and human limitations of the jury system." *Bruton,* 391 U.S. at 135.[3]

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[3] Empirical studies have found that jurors often misunderstand instructions, which "may also reflect the acceptance or resistance of jurors to legal instructions; to the extent that the instruction conflicts with an individual juror's personal sense of justice, that conflict may reduce his or her comprehension and application scores." Lawrence J. Severance & Elizabeth F. Loftus, *Improving the Ability of Jurors to Comprehend and Apply Criminal Jury Instructions,* 17 L. & Soc'y Rev. 153, 194 (1982); *see also* Walter W. Steele, Jr. & Elizabeth G. Thornburg, *Jury Instructions: A Persistent Failure to Communicate,* 67 N.C. L. Rev. 77 (1988); *cf. Tome v. United States,* 513 U.S. 150, 171 (1995) (Breyer, J., dissenting) (jurors unlikely to follow instructions limiting use of prior consistent statements); *Delli Paoli v. United States,* 352 U.S. 232, 247 (1957) (Frankfurter, J., dissenting) (implausible that jurors will follow instruction to disregard co-defendant's confession); *Krulewitch v. United States,* 336 U.S. 440, 453 (1949) (Jackson, J., concurring) (fiction that jurors will follow instructions to disregard evidence as to co-defendants).

Although this Court, by necessity,[4] presumes as a general matter that jurors will follow instructions,[5] its confidence is not without limits. For example, in *Honda Motor Co. v. Oberg,* 512 U.S. 415, 432 (1994), the Court rejected the argument that proper jury instructions imposed a sufficient check on the jury's power to award punitive damages in a civil case: "The problem that concerns us, however, is the possibility that a jury will not follow those instructions and may return a lawless, biased or arbitrary verdict." As this Court noted in *Bruton,* Judge Learned Hand on many occasions derided cautionary instructions to a jury to disregard a co-defendant's confession as a "placebo" and as a "recommendation to the jury of a mental gymnastic which is beyond, not only their powers, but anybody else's." *Bruton,* 391 U.S. at 134 n.8 (citations omitted). While acknowledging "the impossibility of determining whether in fact the jury did or did not ignore [the codefendant's] statement in determining petitioner's guilt," *id.* at 136, the Court in *Bruton* refused to turn a blind eye to the hazard that the jury would use the confession despite a limiting instruction.

The issue now before the Court is how to apply the *Bruton* doctrine to a confession in which the co-defendant's name is replaced by the word "deleted" or "deletion." In *Bruton,* the confession referred to Bruton by name. In *Richardson v. Marsh,* 481 U.S. 200, 211 (1987), the confession was "redacted to eliminate not only the defendant's name, but

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[4] Reliance on the jury's ability and willingness to follow instructions as a general rule is an inevitable consequence of the strong policies against exposing the jury's actual deliberative process. *See* Federal Rule of Evidence 606(b); *Tanner v. United States,* 483 U.S. 107, 119 (1987).

[5] *See, e.g., Shannon v. United States,* 512 U.S. 573 (1994).

any reference to his or her existence." The Court in *Richardson* held that a completely redacted confession could be admitted in a joint trial without violating the Confrontation Clause.[6] *Richardson* explicitly reserved the question presented here: whether admission of a redacted confession which refers to a jointly-tried co-defendant, but not by name, violates the *Bruton* rule. *Id.* at 211 n.5.

The Court's opinion in *Bruton* anticipated, but did not decide, this question. The Court cited with approval an opinion by Judge Henry Friendly for the U.S. Court of Appeals for the Second Circuit reversing a conviction in a case in which the trial judge had allowed a witness to read a confession to the jury "with the word 'blank' replacing each name except [the defendant who made the statement]." *United States v. Bozza,* 365 F.2d 206, 215 (2d Cir. 1966), *cited in Bruton,* 391 U.S. at 129 n.4. When the jury requested the confession during deliberations, the court gave it to the jury with the names blacked out, subject to an instruction directing the jury not to use the confession against the co-defendants who had objected to its admission. *Id.* The Second Circuit reversed, holding "only that there is a point where credulity as to the efficacy of

[6] The defendant in *Richardson* complained of a much more subtle risk of prejudice than was involved in *Bruton* or in this case. Even though the co-defendant's statement had been redacted to remove any reference to her role in the offense, Richardson argued that the confession harmed her by corroborating other aspects of the government's case. In *Richardson,* therefore, the issue concerned the use of a statement to enhance the credibility of other government evidence, analogous to the use of constitutionally-tainted evidence for the purpose of impeaching or reducing the credibility of evidence presented by the defense, rather than as substantive proof. *See Walder v. United States,* 347 U.S. 62, 66 (1954). It was also true, however, that by presenting an account of the crime from which she had been eliminated, the confession could actually have aided her defense.

such [limiting] instructions with respect to a confession implicating codefendants is overstrained, and this point was reached here." *Id.* at 217. The *Bruton* opinion quotes the following passage from *Bozza* discussing the reality of jury deliberations:

> It is impossible realistically to suppose that when the twelve good men and women had Jones' confession in the privacy of the jury room, not one yielded to the well nigh irresistible temptation to fill in the blanks with the keys Kuhle had provided and ask himself the intelligent question to what extent Jones' statement supported Kuhle's testimony, or that if anyone did yield, his colleagues effectively persuaded him to dismiss the answers from his mind.

Bruton, 391 U.S. at 129 n. 4 (quoting *Bozza,* 365 F.2d at 215); *see also id.* at 134 n.10 (discussing the practicability of redaction). Nothing has changed in the last three decades that would diminish the risk that a jury -- despite a cautionary instruction -- will use a confession made by one defendant against a co-defendant in a joint trial. The impulse to "fill in the blanks" is as irresistible as ever, as illustrated by the recent nationwide obsession with the identity of the author of the political *roman a clef,* PRIMARY COLORS.

Since this Court's decision in *Richardson,* the lower courts have divided over precisely how to formulate the test for admitting redacted statements.[7] Some courts require an

[7] *See State v. Gray,* No. 15 (Md. Jan. 15, 1997) (J.A. 88, 98-99) (surveying split in authority). Although the Court in *Richardson* explained that it had "granted certiorari because the Sixth Circuit's decision conflicts

incriminating inference to be "compelled," while others look for a "substantial risk" of incrimination. Gray should prevail under either standard, or under any other test faithful to the teachings of *Bruton,* because on this record it is impossible realistically to suppose that Gray's jury did not fill in the "deletions" with his name and that of the only other person ever identified by the police in their investigation. In our view, however, the inquiry should not turn on the semantics of probability ("compelled" rather than "substantial" risk), but rather on a principled distinction between "me only" confessions such as the one admitted in *Richardson,* and statements that refer to or can be linked to co-defendants, even when the names are veiled by magic marker, white-out, or "neutral pronouns." A cautionary instruction does nothing to dissuade, and may even invite, jurors to connect the word that

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with those of other Courts of Appeals which have declined to adopt the 'evidentiary linkage' or 'contextual implication' approach to Bruton questions," *Richardson,* 481 U.S. at 206, the Court explicitly confined its resolution of this conflict to statements such as those in *Richardson,* without reaching the application of *Bruton* to statements, such as the one in this case, which are redacted in such as way as to call attention to what has been omitted, leaving little to the jury's imagination or inference. Some courts have read *Richardson* broadly to stand for the proposition that the decision whether to admit a confession should be made entirely without regard to the other evidence heard at trial -- requiring, in other words, that a redacted confession be viewed in isolation. *See, e.g., United States v. Green,* 115 F.3d 1479, 1485 (10th Cir. 1997); *United States v. Jimenez,* 77 F.3d 95, 98 (5th Cir. 1996); *United States v. Sherlin,* 67 F.3d 1208, 1215 (6th Cir. 1995); *United States v. Williams,* 936 F.2d 698, 700 (2d Cir. 1991) (redacted confession must be viewed in isolation); *United States v. Vogt,* 910 F.2d 1184, 1192 (4th Cir. 1990). We believe, however, that a narrower reading is more appropriate. To begin with, if the *Richardson* Court had intended to adopt such a broad rule, it would not have reserved the question presented here. Second, the broader issue was not before the Court. Third, context is always relevant to meaning; evidence in a jury trial is no exception.

has so obviously been deleted to the person to whom they have just been told not to connect it.

A. A Principled Line Can and Should Be Drawn Between Confessions Redacted to Implicate Only the Declarant and Portions of a Confession Referring, Directly or Indirectly, to a Jointly-Tried Co-Defendant.

In *Cruz v. New York,* 481 U.S. 186, 191 (1987), this Court made clear that *Bruton* had announced a categorical rule based on the risk that, in general, juries will be unable to follow instructions to disregard a co-defendant's confession, rather than an ad hoc determination to be made depending on the facts of each case. This case requires the Court to draw the line between a completely redacted confession, such as was admitted in *Richardson,* and a confession referring to the co-defendant by name, as in *Bruton.*

The critical distinction between a redacted confession such as the one in *Richardson,* which eliminated any reference to a third party, and a confession that only superficially conceals its subjects without preventing the jury from using the co-defendant's confession as powerful evidence of guilt, is one grounded in principle. As this Court recognized in *Williamson v. United States,* 512 U.S. 594 (1994), the inherent trustworthiness of statements against the declarant's own penal interest does not extend to the portions of statements that inculpate supposed accomplices. In *Williamson,* the Court rejected the government's position that if part of a statement is against the declarant's penal interest, the entire statement is admissible under a hearsay exception. The Court ruled that the rationale for admitting declarations against penal interest does not apply to portions of a statement that incriminate others.

An arrestee who has decided to confess may have

strong motives to implicate others falsely. For example, by naming an "*accomplice," the arrestee may shield his true partner in crime. Or, by placing blame on others, he may diminish his own culpability and probable sentence. "[T]he arrest statements of a codefendant have traditionally been viewed with special suspicion. Due to his strong motivation to implicate the defendant and to exonerate himself co-defendant's statements about what the defendant said or did are less credible than ordinary hearsay evidence." *Id.* at 601 (quoting *Lee v. Illinois,* 476 U.S. 530, 541 (1986)). As *Williamson* illustrates, there is nothing unworkable about a rule that separates those portions of a statement that incriminate the speaker from those less reliable portions that involve others. A "me only" confession of the type admitted in *Richardson* preserves the most reliable aspects of a statement for the jury's consideration, while weeding out those that are less intrinsically reliable and that are likely, despite a limiting instruction, to be used as evidence not subject to the defendant's confrontation rights.

B. The Rationale of *Bruton* Extends to Confessions in Which the Co-Defendant Is Identifiable, Whether or Not the Co-Defendant Is Referred to by Name.

Bruton is rooted in common sense and life experience. A jury that has heard a confession by one defendant implicating a co-defendant who is also on trial, will be unlikely to obey an instruction that requires the jury to consider the evidence against the defendant who made the statement, but not at all against the co-defendant.[8] This risk is not eliminated, or even

[8] An instruction to the jury to disregard the confession as to the co-defendant may make little sense to the jury, unlike an instruction to disregard an eyewitness identification that the evidence has shown to be unconstitutionally suggestive and unreliable. *See Watkins v. Sowders,* 449 U.S. 341, 347 (1981). Defense counsel cannot very well argue the unreliability of the co-defendant's confession insofar as it relates to his or her client, without fatally undermining the instruction to disregard the statement entirely. Consequently, the jury is faced with a command to ignore -- for no apparent reason -- what appears to be highly probative evidence. By contrast, the reasons for disregarding a suggestive identification would be apparent from the evidence.

substantially reduced, by cosmetic surgery on the confession of the kind practiced in this case. While it is true that Gray's name nowhere appears in Bell's redacted confession, it was obvious to any member of the jury that one of the "deletions" referred to Gray, and the other to "Tank" (Jacquin Valandingham), the third identified participant in the affray who, the jury learned, was not on trial because he had been killed.

Context is not irrelevant to the risk that a jury will use one defendant's confession against another. *Cf. Bourjaily v. United States,* 483 U.S. 171, 179 (1987) (evidence gains probative force from surrounding evidence). A confession redacted to conceal all but the initial of the co-defendant is incriminating because of the context, as is a confession referring to the co-defendant by nickname, or by a description. *See Harrington v. California,* 395 U.S. 250, 253 (1969) (Court assumed that the jury had inferred that the defendant was "the white guy" referred to in co-defendants' confessions, but finding the *Bruton* error harmless).

Similarly, a confession in which names are concealed by white-out or marker generally conveys something about the length of the name that has been concealed, and it certainly conveys to the jury that something (probably of great interest) is being hidden. "In those instances [when the inferential step that the jury must take is so small as to be no step at all], the act of redaction becomes a mere formalistic exercise devoid of the

Constitutional protections undergirding *Bruton,* and the confession's exclusion from evidence is warranted." *State v. Gray,* No. 15 (Md. Jan. 15, 1997) (J.A. 100). Confrontation rights cannot depend upon whether a *name* is used in a confession, as opposed to any other form of identification, whether an abbreviation, nickname, or "neutral" label, the true meaning of which is evident from context.[9] Certainly no court would deny a criminal defendant the right to confront a witness just because the witness referred to the defendant in his testimony by a description, a "neutral pronoun," or a label such as "blank" or "deleted."

In contrast to *Richardson,* in which this Court expressed concern that leaving the admissibility of a statement entirely contingent upon the surrounding evidentiary context would leave trial proceedings vulnerable to manipulation by the defense, *Richardson,* 481 U.S. at 209, this case illustrates the ways in which the prosecution can manipulate the context to ensure that the meaning of a partially redacted confession is not lost on the jury. *See id.* at 210 (remanding for determination whether prosecutor's effort to undo limiting instruction violated the due process clause). Here the prosecution adduced testimony from the lead detective about the course of the investigation that made it clear that Gray, Tank, and Bell were the only persons ever identified as having been involved in the beating. (Tr. III. 15). Immediately after eliciting Bell's statement from the detective who took it, the prosecutor asked, "now, officer, after he [Bell] gave you that information, you subsequently were able to arrest Mr. Kevin Gray, is that correct" (Tr. III. 33), thereby explicitly connecting Bell's

[9] The Court's rejection of "context" in *Richardson* arose in discussing a confession no part of which implicated the co-defendant, as opposed to one that on its face incriminated the co-defendant, but which required context to identify him. *See Richardson,* 481 U.S. at 208-09.

statement to Gray's arrest. For this reason, the fact that several other unidentified persons may have been implicated in the assault did not cast any doubt on the supposition that Gray was named in the confession. Also, the redacted confession referred to "deleted and a few other guys," and to "me, deleted, deleted, and a few other guys," assuring there would be no confusion about when Bell was referring to Gray or Tank as opposed to one of the unidentified "other guys." (J.A. 54-56 (typescript version); J.A. 65-68 (handwritten version)).

Moreover, the prosecution made sure that the jury did not lose sight of the inculpatory force of Bell's statement that "deletion" wore a distinctive jacket. The State elicited testimony from witnesses linking Gray to a jacket emblazoned with "Park Heights," and thus assured that the jury would connect him with Bell's answer to the question, "[w]ho else has these jackets," which otherwise had nothing to do with the incident on trial. (Tr. II. 125; Tr. II.206). The only relevance of this testimony was to tie Gray to Bell's confession. The trial judge's instruction to the jury *not* to consider the confession as evidence against Gray -- given that the confession did not use his name -- could only have confirmed the jury's inference that "deletion" was Gray's alias.[10] The prosecutor also guaranteed that the cautionary instruction was ineffective by invoking Bell's confession in her rebuttal argument, without limiting its relevance to Bell:

[10] The only possible source of confusion was over whether a particular "deletion" referred to Gray or to "Tank," but this only made matters worse for Gray, because the jury may have speculated that Gray, rather than "Tank," was the person who first argued with the decedent and who later ran after him and was therefore even more culpable.

> And, ladies and gentlemen, you don't just rely on the State's witnesses. Mr. Bell, Mr. Bell tells you, an argument broke out between Tank and Stacey in the 500 block of Louden Avenue, somewhere down here. Stacey got smacked and then ran onto Wildwood. Me and a few other guys ran after Stacey. Me, *and he was identified by Tracey, Kevin was identified by Tracey and Shay as being in the pack*, and he was identified and he put himself there.

(J.A. 50-51; Tr. IV.123) (emphasis added). This argument wove Bell's confession seamlessly into the other testimony, leaving the jury with no doubts whatsoever about the identity of "deleted," or about how it was supposed to use Bell's confession to evaluate the proof against Gray.

This case illustrates why it is futile to draw a principled distinction between a confession redacted as this one was and a confession that is not redacted at all. While some confessions will be more damaging to a co-defendant than others, the extent of the damage hinges not only on whether the co-defendant is identified by name, as opposed to pseudonym, but also on how much damaging information the confession contains, how credible it seems to be, and how much other evidence is available to persuade the jury without the confession. "Deleted [the co-defendant] shot him," will generally be more prejudicial than a passing reference to the co-defendant by name. If *Bruton* required nothing more than covering the co-defendant's name with "deletion," it would be, in Judge Learned Hand's words, a "placebo," rather than a cure, for a violation of the Confrontation Clause. Sometimes placebos work, but only because the patient cannot tell the difference between the placebo and the real medication. But any jury can tell by looking at or listening to the confession admitted in this case

that something important is missing.

The Sixth Amendment deserves more than a fig leaf. In *Richardson*, the Court upheld the admission of a confession that was redacted to eliminate not only the co-defendant's name, but any reference to her existence. In this way the statement did not call attention to the fact that it had been altered and that something had been omitted, significantly reducing the likelihood that jurors would attempt to guess at what the confessing defendant had to say about his co-defendant. *See United States v. Long*, 900 F.2d 1270, 1280 (8th Cir. 1990); *Smith v. United States*, 561 A.2d 468, 474 (D.C. 1989). Thus, unlike here, there were no blanks for curious jurors to fill in from the surrounding evidence.

Redactions of the form adopted in *Richardson* allow the prosecutor the use of reliable evidence against the declarant, without inspiring the jury to make use of far less reliable information implicating the co-defendant. In cases in which it is impossible to redact the statement to eliminate any reference to the co-defendant without distorting its meaning in a way that would be unfair either to the defendant who made the statement or to the government, however, the trial court will have to sever the trials or empanel separate juries.[11] An inquiry that focuses on whether a proposed redaction would *effectively* delete any reference to a non-confessing co-defendant is consistent with the purpose of the Confrontation Clause and with the truth-seeking function of a criminal trial jury.

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[11] Ordering severance when redaction would compromise the specific trial right of the defendant who made the confession to have the jury hear a complete and accurate account, would be consistent with this Court's decision in *Zafiro v. United States*, 506 U.S. 534, 539 (1993).

C. Trial Judges Need a Clear and Practical Standard for Considering Alternatives Such as Severance or Complete Redaction That Can Be Applied on the Basis of Information Known Before Trial.

There are significant practical advantages to a rule permitting the admission of "me only" statements, but prohibiting veiled references to co-defendants in joint trials. It is important for trial judges to be able to determine in advance of trial whether a confession can be redacted, whether the trials of the co-defendants must be severed, or whether other means such as the use of two juries should be employed to avert prejudice to the co-defendant. *Richardson*, 481 U.S. at 209. Decisions about whether to sever the trials of co-defendants or to redact a confession are generally made before the jury is empaneled and before the evidence is in. The timing makes it difficult for a trial judge to be confident about what evidence will be admitted and about how the evidence might link a co-defendant's confession to a defendant in a joint trial. *See id.* at 209 (not even possible to predict admissibility before trial). Instead of laying odds on the way the evidence will come in at trial, judges should follow straightforward and predictable rules that protect the accused against the incriminatory import of a co-defendant's confession without impairing the integrity of the trial.

There is no reason to take extreme risks that the jury will pierce the veil of a redacted confession because there are "alternatives [to admitting an incompletely-redacted confession] that would have both assured the integrity of the trial's truth-seeking function and eliminated the risk of the jury's improper use of evidence." *Tennessee v. Street*, 471 U.S.

409, 415 (1985).[12] Bell's confession could have been redacted to "eliminate . . . any reference [to Gray's] existence," *Richardson*, 481 U.S. at 211, without distorting the significance of the confession with respect to Bell's culpability, or depriving the jury of relevant evidence.

Bruton is not an exclusionary rule. The prosecution may use a confession without restriction against the person who made it in a separate trial. In a joint trial, the prosecution may redact a statement so that it refers and can be linked only to the person who made it. Neither alternative limits the availability of evidence for a legitimate purpose; both alternatives avoid the prejudicial impact of a confession that is misused to implicate a co-defendant. The availability of these alternatives makes the risk of which the Court spoke in *Bruton* unacceptable. *Cf. Old Chief v. United States*, 117 S. Ct. 644, 652 (1997) (probative value may be calculated by comparing evidentiary alternatives); *see also id.* at 644 n.10 (discussing redaction).

In this case, for example, the court could have required a redaction of Bell's statement consistent with *Richardson*. There was no dispute that "a few other guys" were involved in beating the decedent. Bell's confession could have been

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[12] In *Tennessee v. Street*, by contrast, the co-defendant's confession was admitted to rebut Street's claim that his own confession was a coerced imitation. This was a legitimate purpose that did not implicate the *Bruton* rule, because the defense had a full opportunity to cross-examine the sheriff about the circumstances of the confessions, and the co-defendant's confession was not admitted for its truth. Because of the risk that the jury might nevertheless misuse the confession as substantive evidence of guilt, the Court went on to consider whether the risk could have been avoided "without detracting from the alleged purpose for which the confession was admitted." 471 U.S. at 415. The Court concluded that the State's legitimate purpose could not have been achieved by sanitizing the confession, observing that the defendant's trial already had been severed from those of his co-defendants. *Id.* n.7.

redacted to eliminate any reference to specific individuals, while retaining the information that he was part of a group. The detective's questions that related only to the identity of other participants could have been eliminated entirely without distorting the meaning of Bell's confession with respect to his own involvement.[13] Alternatively, the court could have severed Bell's and Gray's trials. The joint trial lasted only three days, and each separate trial would have been shorter. And, in the real world, the second trial often will be unnecessary. The outcome of the first trial may well produce a guilty plea to a lesser charge or a dismissal. In short, the danger that the jury would be exposed to powerful evidence implicating Gray in the beating could have been avoided without any real cost to the prosecution or to the jury's ability to determine the facts.

A straightforward requirement that only those statements that are completely redacted to eliminate any reference to the co-defendant may be admitted in a joint trial will be much easier for trial judges to apply than a rule that requires them to forecast what evidence will be adduced at trial. Such a requirement also avoids the unfairness of the fiction that if the co-defendant's name does not appear in the statement, it is not incriminating. In those instances in which redaction is not possible, severance will be required. But the administrative costs associated with holding a second trial should receive less weight in the constitutional calculus than the potential for suppression of relevant evidence.

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[13] To illustrate this point, we have attached an alternative redaction in an Appendix to this Brief.

D. *De Minimis* Cases Should Be Handled Under the Harmless-Error Doctrine, Rather than as Exceptions to *Bruton*.

We recognize that there may be instances in which the incriminatory potential of a co-defendant's statement in a joint trial may prove to be *de minimis*. These cases are better handled, however, by applying the harmless-error rule, rather than by weakening the protections of the Confrontation Clause. Many of the lower court opinions upholding convictions despite the admission of a partially-redacted co-defendant's confession rely on an assessment of the overall risk of prejudice, rather than on the specific likelihood that -- despite a limiting instruction -- the jury will use a co-defendant's confession against the accused. These issues are analytically distinct. If the jury is likely, as it was in this case, to infer the identity of "deleted" from the surrounding context, then the rationale of *Bruton* applies, and a limiting instruction will not prevent the jury from misusing the confession as evidence of another defendant's guilt. Whether, all things considered, the potential misuse of such evidence is harmless beyond a reasonable doubt in light of all the evidence should be addressed under the *Chapman* rubric, *see Chapman v. California*, 386 U.S. 18 (1967), rather than by diluting *Bruton* to the point where it is nothing more than a "placebo."

When the likelihood that a jury will draw an inculpatory link between the accused and a co-defendant's confession is remote, the incriminatory significance of the statement slight, or the other evidence of guilt conclusive, the admission of the statement may be harmless. This Court long ago ruled that violations of *Bruton* are subject to the *Chapman* harmless-error standard. *See, e.g., Brown v. United States*, 411 U.S. 223 (1973); *Schneble v. Florida*, 405 U.S. 427 (1972); *Harrington v. California*, 395 U.S. 250 (1969). Since *Harrington*, this

Court has concluded on several occasions that possible *Bruton* violations were harmless beyond a reasonable doubt. The *Chapman* standard (or, in federal habeas corpus actions, the standard announced in *Brecht v. Abrahamson,* 507 U.S. 619 (1993)) is a familiar and easy one for an appellate court to apply after the trial has been completed and the evidence is in. The harmless-error doctrine is a more finely tuned instrument for identifying *de minimis* cases than a "redaction" exception to *Bruton*.

In reversing Gray's conviction, the Court of Special Appeals concluded that "Bell's statement 'might well have tipped the balance in the juror's minds in favor of conviction.'" (J.A. 87) (citation omitted). "Indeed," the Court of Special Appeals observed, "the testimony of some of the witnesses on which the State relies may not have been compelling in the minds of the jurors. Brumfield was not herself a witness to the altercation that resulted in Williams' death and Yarborough's allegedly differing statements could have adversely affected his credibility." (*Id.*). The evidence was in conflict as to whether Gray was near the beating, speaking on a public telephone to his girlfriend, or whether Gray was a participant in the melee. The error here was not harmless beyond a reasonable doubt.

CONCLUSION

For the foregoing reasons, *amici* urge this Court to reverse Gray's conviction and remand the case for a new trial.

Respectfully submitted,

DAVID REISER*
451 Indiana Avenue, N.W.
Washington, D.C. 20001
(202) 628-1200

BARBARA E. BERGMAN
1117 Stanford, N.E.
Albuquerque, NM 87131
(505) 277-3304

*Counsel of Record

Appendix

APPENDIX

(Statement Redacted to Eliminate "Deleteds")

Question: what can you tell me about the beating of Stacey Williams that occurred on 10, November, 1993?

Answer: an argument broke out between [Tank] and Stacey in the 500 block of Louden Avenue. Stacey got smacked and then ran onto Wildwood Parkway. Me, [Tank] and a few other guys ran after Stacey. We caught up to him on Wildwood Parkway. We beat Stacey up. After we beat Stacey up, we walked him back to Louden Avenue. I then walked over and used the phone, Stacey and the others walked down Louden.

Question: when Stacey was beaten on Wildwood Parkway, how was he beaten?

Answer: hit, kicked.

Question: who hit and kicked Stacey?

Answer: I hit Stacey. He was kicked, but I don't know who kicked him.

Question: who was in the group that beat Stacey?

Answer: me, ~~deleted, deleted,~~ and a few other guys.

~~*Question*: do you know the other guy's names?~~

~~*Answer*: deleted, deleted, and me. I don't remember who was out there.~~

Question: did anyone pick Stacey up and drop him to the ground?

Answer: no, when I was there.

Question: what was the argument over between Stacey and [Tank]?

Answer: some money that Stacey owed [Tank].

Question: about how many guys were hitting on Stacey?

Answer: about six guys.

~~*Question*: do you have a jacket with Park Heights written on the back?~~

~~*Answer*: yes.~~

~~*Question*: who else has these jackets?~~

~~*Answer*: deletion.~~

Question: after reading this statement, would you sign it?

Answer: yes.

No. 96-8653

Supreme Court, U.S.
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October Term, 1996

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BRIEF FOR THE STATES OF NEW YORK, CONNECTICUT, DELAWARE, HAWAII, LOUISIANA, MICHIGAN, MONTANA, NEVADA, OKLAHOMA, UTAH AND VERMONT AS AMICI CURIAE IN SUPPORT OF RESPONDENT

DENNIS C. VACCO
Attorney General of the State of New York
The Capitol
Albany, NY 12224
(518) 486-4087

Dated: September 30, 1997

BARBARA G. BILLET*
Solicitor General

PETER H. SCHIFF
Deputy Solicitor General

MARLENE O. TUCZINSKI
Assistant Attorney General

Of Counsel

**Counsel of Record*

(Additional Counsel listed on Inside Cover)

Printed on Recycled Paper

18 pp

JOHN M. BALLEY
Chief State's Attorney
State of Connecticut
300 Corporate Place
Rocky Hill, CT 06067
(860) 258-5800

M. JANE BRADY
Attorney General
State of Delaware
820 North French Street
Wilmington, DE 19801
(302) 577-2500

MARGERY S. BRONSTER
Attorney General
State of Hawaii
425 Queen Street
Honolulu, HI 96813
(808) 586-1500

RICHARD P. IEYOUB
Attorney General
State of Louisiana
P.O. Box 94095
Baton Rouge, LA 70804-9095
(504) 342-7552

FRANK J. KELLEY
Attorney General
State of Michigan
P.O. Box 30212
Lansing, MI 48909
(517) 373-1110

JOSEPH P. MAZUREK
Attorney General
State of Montana
Justice Building
P.O. Box 201401
Helena, MT 59620-1401
(406) 444-2026

FRANKIE SUE DEL PAPA
Attorney General
State of Nevada
100 North Carson Street
Carson City, NV 89701-4717
(702) 687-4170

W.A.DREW EDMONDSON
Attorney General
State of Oklahoma
2300 North Lincoln Boulevard
Suite 112
Oklahoma City, OK 73105-4894
(405) 521-3921

JAN GRAHAM
Attorney General
State of Utah
236 State Capitol
Salt Lake City, UT 84114
(801) 538-9600

WILLIAM H. SORRELL
Attorney General
State of Vermont
109 State Street
Montpelier, VT 05609-1001
(802) 828-3171

THE REPORTER COMPANY AND THE WALTON REPORTER, INC.
181 Delaware Street, Walton, NY 13856—800-252-7181
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INTERESTS OF AMICI CURIAE

The amici curiae appearing in support of respondent are States bound by an interest in promoting the effective and efficient resolution of criminal matters in the courtrooms within their respective jurisdictions.

Should this Court determine that confessions of non-testifying co-defendants may be admissible at multiple defendant trials only if redacted in conformity with *Richardson v Marsh*, 481 U.S. 200 (1987), we expect that few such confessions will be amenable to such a conversion. The result would be to give prosecutors the dubious choice of foregoing the use of confessions or consenting to severance requests, leading to a likely increase in the number of trials conducted. Any added volume of litigation to an already overburdened system would implicate the ability to provide speedy trials, and an increase in severance requests would enhance the likelihood of inconsistent verdicts and verdicts issued without regard to relative culpability. The intangible result will be the dilution of justice.

For these reasons, we file this brief in support of respondent, the State of Maryland.

SUMMARY OF ARGUMENT

The Confrontation Clause states, "the accused shall enjoy the right. . . to be confronted with the witnesses against him". US Const. Amend. 6. In *Bruton v United States*, 391 U.S. 123, 136 (1968), this Court saw what it described as "powerfully incriminating" evidence being used at a criminal trial against a defendant, without opportunity being given the defense to confront the source. Because the evidence was in the form of a confession that specifically implicated this defendant, the Court concluded that the trial court's instructions to the jury to limit its application of the confession to the confessor was not enough to prevent the inevitable devastating prejudice to the defendant. Thus, a "narrow exception", *Richardson v Marsh*, 481 U.S. 200, 207 (1987), was made to the presumption that juries follow their instructions, and prosecutors were required to do more with such incriminating confessions to make them admissible at trials of multiple defendants.

The method of redaction employed by the State of Maryland in this case, together with limiting instructions to the jury, allowed the introduction of a confession at trial without spillover prejudice to the co-defendant. Because the *Bruton* Court allowed variations on achieving compliance with the Confrontation Clause, 391 U.S. at 133-134, and the jury would be presumed to follow its instructions under these circumstances, the procedure used by the State of Maryland was appropriate, and not violative of the Confrontation Clause.

The criminal justice system needs a clear rule as to how far a prosecutor must redact and revise the proof to be presented at trial so as to know when the benefit of a multiple defendant trial is outweighed by the burden imposed. Here, the State of Maryland achieved a proper balance between the competing interests of the state and the accused. The procedure of redacting facial implications from confessions, bolstered by a limiting instruction, was adequate to prevent the degree of prejudice anticipated in *Bruton*. The order of the Maryland Court of Appeals upholding the use of the confession as redacted, should be affirmed.

ARGUMENT

THE METHOD OF REDACTION EMPLOYED BY THE STATE OF MARYLAND TO PERMIT THE INTRODUCTION OF A CONFESSION AT A CRIMINAL TRIAL, WITH LIMITING INSTRUCTIONS TO THE JURY, REMOVED ALL SPILLOVER PREJUDICE TO A CO-DEFENDANT SO AS NOT TO BE VIOLATIVE OF THE CONFRONTATION CLAUSE.

The method employed by the State of Maryland in redacting petitioner's name from a co-defendant's confession, with limiting instructions to the jury, was not violative of the Confrontation

Clause. Although the Court in *Richardson v Marsh*, 481 U.S. 200 (1987), ruled that a confession which is redacted to eliminate reference to the existence of a co-defendant complies with the Confrontation Clause when the confessor does not testify, it did not create a bright-line rule that no other form of redaction was possible.

Here, the State of Maryland's use of the words "delete" and "deleted" in place of petitioner's name in a confession by a co-defendant removed all facial implications of him before the jury. The court's instructions, given at the time testimony was received about the confession and again at the end of the case, properly advised the jury about the limited use to be made of the statement. These procedures prevented the "devastating" prejudice to the petitioner foreseen in *Bruton v United States,* 391 U.S. 123 (1968), and achieved a proper balance between the state's interest in promoting criminal justice and the accused's right to confront witnesses against him.

A. CONSISTENT WITH THIS COURT'S DECISION IN *BRUTON*, THE REDACTION WITH A LIMITING INSTRUCTION AS APPROVED BY THE COURT BELOW, WAS NOT VIOLATIVE OF THE CONFRONTATION CLAUSE.

The procedure undertaken by the State of Maryland in removing petitioner's identity and all incriminating references to him from his co-defendant's confession, was consistent with this Court's decision in *Bruton v United States*, 391 U.S. 123 (1968), and not violative of the Confrontation Clause. In *Bruton*, this Court interpreted what a jury would intellectually accept in the instructions it received and created a limited exception to the well-settled presumption that juries follow the law. A confession by one defendant, implicating Mr. Bruton, his co-defendant, was introduced at their joint trial with limiting instructions that the jury was to consider the confession as evidence against the

confessor and not against Mr. Bruton. Although the statement would have been admissible as against the maker, this Court found that it was so prejudicial to Mr. Bruton that a jury could not be expected to comply with the accompanying limiting instruction not to use it against Mr. Bruton. The Court viewed the confession as "facially incriminating" and so damaging that a jury would not be able to disregard it when assessing the proof against the co-defendant. Without an opportunity to cross-examine the maker of the statement, Mr. Bruton was deemed denied his right of confrontation. Thus, this "narrow exception" to the presumption that juries follow the law was created and there has been no other exception made. *Richardson v Marsh,* 481 U.S. at 207.

In the same opinion, the Court acknowledged that there were competing interests between the State and the accused and held that there were "viable alternatives" which would not deny a prosecutor "the benefit of the confession to prove the confessor's guilt", without "infringing the nonconfessor's right of confrontation". 391 U.S. at 133-134.

The Court later advised that "[i]f limited to facially incriminating confessions, *Bruton* can be complied with by redaction". *Lee v Illinois*, 476 U.S. 530, 542 (1986). In the 1987 *Richardson* case, the Court had an opportunity to review the extreme steps taken by a trial court in redacting a confession admitted at a joint trial. The confession, which was facially incriminating to a co-defendant, was rewritten to eliminate all references to the conduct of the co-defendant, to the point of removing all references to her existence. This measure was ratified by this Court since "the calculus changes when confessions that do not name the defendant are at issue". 481 U.S. at 211. No longer "facially incriminating", the sanitized confession was admissible with a limiting instruction.

Since then this Court has explained that "the risk of prejudice will vary with the facts in each case. . . When the risk of prejudice is high, a district court is more likely to determine that separate trials are necessary, but, as we indicated in *Richardson v Marsh,* less drastic measures, such as limiting instructions, often will suffice to cure any risk of prejudice.". *Zafiro v United States*, 506 U.S. 534, 539 (1993). In cases with higher degrees of risk to a co-defendant than found here, this Court has permitted curative instructions to obviate the need for severance. For example, this Court has rejected a call for a bright-line rule requiring severance when there are "conflicting defenses" or "mutually antagonistic defenses" between and among co-defendants. *Zafiro v United States*, 506 U.S. 534 (1993). Clearly, the risk of harm inherent in a joint trial of multiple defendants who are blaming each other for the crime is not less than that found in a confession having all facial incriminations masked by redaction. In another case, the Court has allowed the use of an unredacted accomplice confession for the limited purpose of rebutting the defense that the confession of the co-defendant was coerced. *Tennessee v Street,* 471 U.S. 409 (1985). In both cases, the Court specifically has relied on the curative or limiting instructions of the trial court to remove the risks of prejudice to the co-defendants.

Here, rather than take the extreme step seen in *Richardson,* the State of Maryland adopted a moderate procedure to revise a *Bruton* confession, with an appropriate limiting instruction from the trial court. To comply with the *Bruton* rule, the trial court permitted redaction of the names of all co-actors referred to in the statement and allowed the State to insert the words "delete" and "deleted" in their place. The jury was then twice instructed as to the limited use of the confession in their deliberations.

By comparing the relative risk of prejudice in *Zafiro* and *Tennessee* to that degree of risk anticipated in the instant case,

it is clear that the trial court in Maryland acted appropriately. The procedures adopted for redaction were not unrealisitic in the expectations imposed on the jury. Indeed, mindful that the stated goal of *Bruton* is to prevent "spill-over prejudice" to a defendant when he is implicated by another defendant who cannot be cross-examined, *Lee v Illinois*, 476 U.S. at 542, the redaction by the State of Maryland, coupled with the trial court's instructions to the jury, adequately minimized any risk of prejudice to Mr. Gray.

The Maryland Court of Appeals correctly determined that the redacted statement did not facially incriminate Mr. Gray and any identification of him by the jury was not "compelled" by the other evidence before it (JA 105). Testimony by two prosecution witnesses who observed Mr. Gray's conduct at the scene of the group assault provided adequate proof of his involvement. A review of the redacted confession (JA 54-56) reveals that it was not as powerfully incriminating, if at all, as is insisted here by petitioner. Moreover, the court's instructions were sufficient to limit its application to the confessor.

If, as argued by petitioner, more than redaction of facial incrimination would be required of a prosecutor when attempting to introduce a confession at a multiple defendant trial, the adverse consequences to all parties cannot be overlooked. The impact on the effectiveness of the jury system cannot be ignored. Formulating a confession whereby the maker is portrayed as the lone actor, in a crime clearly evidencing several people would cast doubt on the maker's credibility. A jury that hears such a statement would pause to question the reliability of the words, as well as the effectiveness of the investigation. Moreover, the testimony of the police officers involved in the confession would need to be given with such care and caution that their own credibility would depend on how naturally they could appear when editing their responses to fit the final product. In practice, all of the rewriting and testifying in conformance with the

admissions could be for naught, if after the prosecutor has rested, the confessor chooses to testify.

It is likely that, rather than face the daunting task of editing a confession, prosecutors would opt for separate trials. But the costs would be high and the burdens most significant. All the reasons why joint trials are preferred would not outweigh the inability to comply with an intolerable extension of the *Bruton* rule.

B. JURIES MAY BE PRESUMED TO FOLLOW INSTRUCTIONS THAT ARE GROUNDED IN THEIR COMMON EXPERIENCE AND RESTATE THEIR WIDELY HELD BELIEFS.

We should continue to presume that juries follow the instructions they are given by the trial court and that they readily accept the law when it is consistent with their own experiences.

Juries are presumed to follow their instructions. *Francis v Franklin*, 471 U.S. 307, 325 n.9 (1965). This Court consistently has reaffirmed and relied upon this premise, describing it as a "crucial assumption" underlying our legal system. *Parker v Randolph*, 442 U.S. 62, 73 (1979); *Zafiro v United States*, 506 U.S. 534 (1993). Without such an assumption, "it would be pointless for a trial court to instruct a jury, and even more pointless for an appellate court to reverse a criminal conviction because the jury was improperly instructed". *Parker v Randolph*, 442 U.S. at 73. The belief that "juries, conscious of the gravity of their task, attend closely the particular language of the trial court's instructions in a criminal case and strive to understand, make sense of, and follow the instructions given them", *Francis v Franklin*, 471 U.S. 307, 324,n. 9 (1985), quoted in *United States v Olano*, 507 U.S. 1770 (1993), is necessary because we devote ourselves to a system that entitles us to judgment by a jury of our peers.

Our reliance on the jury to follow the law allows a court, in good conscience, to consign them issues of even the gravest importance. Consideration of penalty upon conviction, particularly the exercise of capital punishment, could only be given to members of our communities who are found to be willing and able to adhere to the laws as explained by the court. Such instruction, as any other, must be clear and with common meaning, permitting each juror to interpret fairly and impartially, weigh and apply the evidence and legal rules in reaching a just verdict. *Boyd v California,* 494 U.S. 370 (1990). In most instances, this is done.

Everyday we ask trial juries to accept evidence for specific and limited purposes and disregard it for others. Jurors are instructed to consider prior convictions, not to show criminal propensity, but to prove a specification for the charge (*Marshall v Lonberger*, 459 U.S. 422 [1983]); prior commission of the same criminal behavior as charged, not to show present guilt, but as proof only of notice, intent, motive, identification or lack of mistake (*Huddleston v United States,* 485 U.S. 681 [1988]); confessions unlawfully obtained, not for their admission, but for impeachment purposes (*Harris v New York,* 401 U.S. 222 [1971]). Even pretrial publicity and stricken testimony are to be disregarded. In all these instances, this Court has found that any risk of prejudice created by the use of the particular evidence was removed by the proper instructions to the jury. Those who advocate limiting the presumption that juries follow the law, rely on psychological studies and writings about human behavior and our ability to process and use information such as that received at a trial. Some conclude that juries are prone to ignore a judge's instructions or resist the legal explanation in favor of their own perceptions[1]. *See*, J. Casper, K. Benedict and J. Perry, "Juror

---

[1]The process by which a jury resists a court's instructions because it is

(continued...)

Decision Making, Attitudes, and the Hindsight Bias", 13 *Law and Human Behavior* 3, p 291-312 (1989). Yet, those conclusions are not based directly upon empirical data and are usually offered merely to explain the results of their questionnaires. Indeed, these same studies, using questions emanating from a jury room as data, overlook the fact that there is such a high volume of jury questions, requesting further clarification and refinement of important pivotal words set forth in the instructions. Carretta & Moreland, "The Direct and Indirect Effects of Inadmissible Evidence", 13 *J. Applied Soc. Psychology* 291 (1983). The sheer number and type of questions make it clear that juries are fully intending to understand the meaning of the law and to apply it fairly to the facts before them. It remains speculative that jury reactance or jury nullification operates to undermine the process. *See,* C. Visher, "Juror Decision Making-The Importance of Evidence", 11 *Law and Human Behavior* 1, n1-11 (1987) (in which the author criticizes cognitive researchers who ". . . in the quest to identify sources of bias in jurors' decisions, . . . have often overlooked the impact of trial evidence which presumably dominates these decisions".). And it has been suggested that group deliberation would meliorate hindsight bias inherent in individual human cognitive reasoning.

It is apparent, however, that clear wording, simple sentences and everyday examples are necessary to educate a jury about the legal principles they are to apply. Common sense dictates that if members of a jury already hold a belief about the reliability or unreliability of certain evidence, it is reasonable to expect that

---

[1](...continued)
inconsistent with the jury's prior understanding of, or beliefs related to, a point of law is described as "jury reactance". "Jury nullification" occurs when a jury "acquits against the evidence", and in so doing, ignores the court's instructions. J. Casper, K. Benedict and J. Perry, "Juror Decision Making, Attitudes, and the Hindsight Bias", 13 *Law and Human Behavior* 3, p 291-310 (1989).

the court's instructions will merely confirm what they have accepted in their own lives to be true.

Here, the jury would be expected to have no problem in accepting the words of the court that the redacted confession was to be applied as against only the confessor for several reasons. First, unlike in *Bruton*, the implicating statements were not "deliberately spread before the [them]". *Bruton v United States,* 391 U.S. at 136. Petitioner makes much of the fact that a jury will seek to "fill in the blanks" when offered a redacted statement. Yet, this is only speculative and there is nothing to suggest that the jury would not follow the law and rely on the direct testimony offered by the prosecution to prove the case against petitioner.

Second, although the Court has found confessions to be "powerfully incriminating" and "devastating", *Lee v Illinois*, 476 U.S. at 542, realistically, this is so only against the confessor. It is an overstatement to assert that everything said in a confession has the same prejudicial effect for everyone it may also incriminate. The risk of prejudice will depend on the details of the confession, the appearance of any attempt to minimize by the confessor, the amount of corroboration available, the relative importance and nature of other evidence, and any defense presented by the incriminated accomplice.

Third, if as this Court has stated, confessions that implicate others "have traditionally been viewed with special suspicion" and are "presumptively unreliable", *Lee v Illinois*, 476 U.S. at 541 and 543, it is inconsistent to attribute to them the same degree of resulting harm as given to the truly self-incriminatory confessions. Common sense suggests that a defendant's incrimination of another may be unreliable and untrustworthy. Fingerpointing is readily recognizable for what it is. There are countless examples of the untrustworthiness of the word of a co-defendant who has a "strong incentive to shift blame or down-

play his own role in comparison with that of others", *Williamson v United States*, __ U.S. __, 114 S. Ct. 2431, 2439 (1994), and none of this would be lost on a trial jury.

Certainly, this is what was meant in the dissenting opinion in *Cruz v New York*, 481 U.S. 186, 195-196 (1987), wherein it was said that "a co-defendant's out-of-court statements implicating the defendant are not only hearsay but also have traditionally been viewed with special suspicion. . . .And the jury may be so informed.".

It must be remembered that a defendant is not entitled to a "perfect trial". *Brown v United States*, 411 U.S. 223, 231-232 (1973). "Not every admission of inadmissible hearsay or other evidence can be considered to be reversible error unavoidable through limiting instructions; instances occur in almost every trial where inadmissible evidence creeps in, usually inadvertently". *Bruton v United States*, 391 U.S. at 135. *See, Hopt v Utah*, 120 U.S. 430 (1887).

An observation made in the dissenting opinion of *Lee v Illinois*, 476 US 530, 548 (1986), candidly suggests that the Court should not be "overly concerned with theory and pronounced principles for their own sake, and [should not] disregard the significant realities that so often characterize a criminal case. There is a real world as well as a theoretical one."

Instructions to a jury, perhaps reminding the members of their commonly held beliefs that words casting blame may be unreliable, would eliminate any danger that their "practical and human limitations", 391 U.S. at 135, would be reached. Words from the trial court that reaffirm what the jurors know from experience would be adequate protection against any "spillover prejudice" to an incriminated co-defendant. In any event, under the circumstances presented in the instant case, the procedures undertaken accomplished this result.

CONCLUSION

THE ORDER AND JUDGMENT OF THE COURT OF APPEALS OF MARYLAND SHOULD BE AFFIRMED.

Dated: Albany, New York
September 30, 1997

Respectfully submitted,

DENNIS C. VACCO
Attorney General of the
State of New York

BARBARA G. BILLET*
Solicitor General

PETER H. SCHIFF
Deputy Solicitor General

MARLENE O. TUCZINSKI
Assistant Attorney General

of Counsel

*Counsel of Record

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On Writ of Certiorari to the Court of Appeals of Maryland

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

KENT S. SCHEIDEGGER
CHARLES L. HOBSON*
Criminal Justice Legal Fdn.
2131 L Street
Sacramento, CA 95816
Telephone: (916) 446-0345

Attorneys for Amicus Curiae Criminal Justice Legal Foundation

*Attorney of Record

35 pp

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QUESTION PRESENTED

Is a confession which would qualify as a declaration against penal interest exempt from the rule of *Bruton* v. *United States* by virtue of being a firmly rooted exception to the hearsay rule?

IN THE

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STATE OF MARYLAND,

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MOTION OF *AMICUS CURIAE* FOR LEAVE TO FILE BRIEF IN SUPPORT OF THE RESPONDENT

Pursuant to Supreme Court Rule 37.3, the Criminal Justice Legal Foundation respectfully moves for leave to file the accompanying brief *amicus curiae* in support of the respondent. Counsel for respondent has consented, but counsel for petitioner has withheld consent.

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF) is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the due process protection of the accused into balance with the rights of the victim and of society to rapid, efficient and reliable determination of guilt and swift execution of punishment.

The present case presents this Court with the chance to recognize the changes in the law that have taken place since *Bruton* v. *United States*, 391 U. S. 123 (1968). Declarations

against penal interest are now a firmly rooted exception to the hearsay rule. Therefore, codefendant confessions can now be admitted to inculpate defendants, reducing the need for *Bruton*. Allowing wider use of voluntary, probative, reliable confessions furthers the interests of truth and justice. Such a result is consistent with the interests of victims and society which CJLF was formed to advance.

For the foregoing reasons, *amicus* requests leave to file its brief.

September, 1997

Respectfully submitted,

CHARLES L. HOBSON

Attorney for Amicus Curiae
Criminal Justice Legal Foundation

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

KEVIN D. GRAY,

Petitioner,

vs.

STATE OF MARYLAND,

Respondent.

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF THE RESPONDENT

SUMMARY OF FACTS AND CASE

On November 10, 1993, Stacey Williams was beaten to death "by a group of six young men." *State* v. *Gray*, 687 A. 2d 660, 661 (Md. 1997).[1] Anthony Bell was arrested by police after a preliminary investigation of the killing. Bell, in a written statement to the police, implicated himself, Jacquin Vanlandingham, and petitioner Gray as participants in the killing. *Ibid.* Two days after Williams' death, Vanlandingham was shot to death in a seemingly unrelated incident. *Ibid.*, and n. 1.

Bell and Gray were tried jointly. The trial court denied Gray's motion to sever his and Bell's trials or to exclude Bell's

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1. Rule 37.6 Statement: This brief was written entirely by counsel for *amicus*, as listed on the cover, and not by counsel for any party. No outside contributions were made to the preparation or submission of this brief.

confession. *Ibid.* The trial court did order the redaction of Gray's and Vanlandingham's names from the confession. *Ibid.*

At trial, Shay Yarberough "the only witness to Williams' beating testified that he saw Vanlandingham lift Williams over his head and drop him on the sidewalk." *Ibid.* Yarberough also stated that Gray attempted to do the same, with less success. *Ibid.* He also testified that Gray along with the rest of the group "repeatedly kicked Williams about the ribs, neck, and head." *Id.*, at 661-662.

Detective Pennington testified that he arrested and interviewed Bell after investigating the crime. During the interview, Bell confessed, implicating both Gray and Vanlandingham. *Id.*, at 662.

A copy of Bell's confession was admitted, with blank white spaces replacing Gray's and Vanlandingham's names. *Ibid.* Defendant testified that he was at a nearby phonebooth calling his girlfriend during the beating. *Ibid.* Defendant's girlfriend affirmed this story, while another defense witness who claimed to have seen the beating placed defendant in a phonebooth "up the street" during the killing. Defendant was convicted of involuntary manslaughter. *Ibid.* The pertinent part of Bell's confession read:

> "Question, what can you tell me about the beating of Stacey Williams that occurred on 10, November, 1993?
>
> "Answer, an argument broke out between *deletion* and Stacey in the 500 block of Louden Avenue. Stacey got smacked and then ran into Wildwood Parkway. Me, *deleted*, and a few other guys ran after Stacey. We caught up to him on Wildwood Parkway. We beat Stacey up. After we beat Stacey up, we walked him back to Louden Avenue. I then walked over and used the phone, Stacey and the others walked down Louden.
>
> "Question, when Stacey was beaten on Wildwood Parkway, how was he beaten?
>
> "Answer, hit, kicked.

> "Question, who hit and kicked Stacey?
>
> "Answer, I hit Stacey. He was kicked, but I don't know who kicked him.
>
> "Question, who was in the group that beat Stacey?
>
> "Answer, me, *deleted*, *deleted*, and a few other guys.
>
> "Question, did anyone pick Stacey up and drop him to the ground?
>
> "Answer, no, when I was there.
>
> "Question, what was the argument over between Stacey and *deleted*?
>
> "Answer, some money that Stacey owed *deleted*.
>
> "Question, how many guys were hitting on Stacey?
>
> "Answer, about six guys.
>
> "Question, do you have a black jacket with Park Heights written on the back?
>
> "Answer, yes.
>
> "Question, who else has these jackets?
>
> "Answer, *deletion*." *Id.*, at 667-668.

Before the confession's introduction, the jury was instructed to consider it against Bell only, and not Gray. *Id.*, at 668.

The Maryland Court of Special Appeals reversed, holding that the introduction of Bell's redacted confession violated *Bruton* v. *United States*, 391 U. S. 123 (1968). *Gray* v. *State*, 667 A. 2d 983, 985, 990-991 (1995). The Maryland Court of Appeals reversed, finding no *Bruton* violation. *State* v. *Gray*, 687 A. 2d, at 669.

SUMMARY OF ARGUMENT

Before deciding how a confession must be redacted in order to satisfy *Bruton* v. *United States*, this Court should first determine whether *Bruton* applies. If Bell's statement could be

admissible against Gray as a "firmly rooted" exception to the hearsay rule, *Bruton* does not apply. This case is an appropriate vehicle to determine how the passage of time has changed the need for *Bruton*.

None of this Court's decisions have categorically disqualified the penal interest exception under the Confrontation Clause. *Bruton*'s analysis is colored by the fact that when it was decided, declarations against penal interest were generally inadmissible. *Cruz* v. *New York* was simply an application of *Bruton*'s logic and underlying assumptions to the problem of interlocking confessions.

Lee v. *Illinois* must be read in light of the statement it rejected. Because the statement was apparently self-serving and motivated by revenge, it was not against declarant's interest. *Lee* only recognizes that such statements cannot qualify under the Confrontation Clause.

Williamson v. *United States* demonstrates that the status of declarations against penal interest under the Confrontation Clause is still undetermined. The fact that all members of this Court were willing to consider that such evidence is admissible under some circumstances demonstrates how much the law has changed since *Bruton*.

Under *Ohio* v. *Roberts* firmly rooted exceptions to the hearsay rule satisfy the Confrontation Clause. Declarations against penal interest fall within one such exception. Their initial exclusion from the declarations against interest exception was based on a misreading of the law by the House of Lords. This archaic view violates common sense. Justice Holmes, Dean Wigmore, and others demonstrated that people generally do not incriminate themselves lightly, and are thus unlikely to lie when they do so. The Holmes-Wigmore view has carried the day, as the declaration against penal interest exception is observed by most jurisdictions, including the federal courts.

The standard argument against the admissibility of this evidence, that the declarant has a motive to incriminate others, can and has been addressed by the courts. The most likely

motives to cause one to falsely inculpate another are currying favor, revenge, and exculpation. The first motive can be found by courts, and is minimized by the giving of *Miranda* v. *Arizona* warnings. Where the declaration is not made in custody, or where there has been no promise of leniency and the declarant was read his *Miranda* rights, there is no reason to suspect that the statement is an attempt to curry favor.

Revenge may be found from the facts. *Lee* demonstrates how this is done and how to address it. *Williamson* and *Lee* show that truly exculpatory statements are not against declarant's interest, and thus do not come within the exception.

The confession in the present case comes within the declaration against penal interest exception. Declarant Bell was read his *Miranda* warnings, and he neither was promised nor received any benefits from his confession. Where he implicated Gray, he implicated himself equally. As this was a statement a reasonable person in Bell's position would not make unless true, Bell's statements do not violate defendant's confrontation rights.

ARGUMENT

The rule of *Bruton* v. *United States*, 391 U. S. 123, 137 (1968), that admitting an accomplice's confession violates the confrontation rights of any codefendant incriminated by the confession, is based on the assumption that any statement in a confession inculpating third parties is inadmissible hearsay. *Id.*, at 128, n. 3; see also *Lee* v. *Illinois*, 476 U. S. 530, 552, n. 5 (1986) (Blackmun, J., dissenting). The present case presents the opportunity to examine *Bruton*'s reach in light of nearly two decades of development of evidence law.

The decision below turned on whether *Bruton* was properly applied by deleting the names of those other than the person confessing from the confession. See *State* v. *Gray*, 687 A. 2d 660, 667-669 (Md. 1997). *Amicus* submits that *Bruton* does not apply to the present case. Codefendant Bell's confession, while

hearsay, would qualify under the declaration against penal interest exception to the hearsay rule. See Part III, *post*. As this exception is now sufficiently "firmly rooted" as a hearsay exception to satisfy the Confrontation Clause, see Part II B, *post*, *Bruton* should not apply to appropriate uses of statements against penal interest that inculpate third party defendants.

If *Bruton* has been narrowed by developments in the law, this Court should address this issue before issuing further mandates on *Bruton*'s proper execution. In addition to limiting applications of the *Bruton* rule, this narrowing would also influence how the decision is applied. Since statements against penal interest are no longer per se inadmissible, as was the case when *Bruton* was decided, see 391 U. S., at 128, n. 3, the need for vigilance against purportedly improper inculpation may be relaxed. Thus the propriety of the use of the confession in the present case should be influenced by the rebirth of the declaration against penal interest as a generally accepted hearsay exception.

Amicus is not asking this Court to overrule *Bruton*; there will be times when the Confrontation Clause should bar a codefendant's confession from inculpating defendant. However, *Bruton* should be limited. Voluntary "[a]dmissions of guilt" are "not an evil but an unmitigated good . . . ." *McNeil* v. *Wisconsin*, 501 U. S. 171, 181 (1991). Rules excluding this evidence such as *Bruton*, should be limited to those instances where they clearly advance the cause of accuracy. The Confrontation Clause requires no more. See *United States* v. *Inadi*, 475 U. S. 387, 396 (1986).

I. Whether a declaration against penal interest satisfies the Confrontation Clause is an open issue.

Although the use of accomplice confessions to inculpate codefendants has led to the reversal of convictions by this Court, the practice has not been categorically banned under the Confrontation Clause. Instead, the decisions rejecting such

evidence have either assumed such evidence to be inadmissible, or have dealt with a statement that was not truly against the declarant's penal interest. The validity of declarations against penal interest is demonstrated by the federal penal interest rule, Federal Rule of Evidence 804(b)(3), and its interpretation in *Williamson* v. *United States*, 512 U. S. 594 (1994).

As noted earlier, the *Bruton* Court dealt with a hearsay statement against penal interest that was inadmissible as a matter of federal law.

> "We emphasize that the hearsay statement inculpating petitioner was clearly inadmissible against him under traditional rules of evidence . . . . There is not before us, therefore, any recognized exception to the hearsay rule insofar as petitioner is concerned and we *intimate no view whatever* that such exceptions necessarily raise questions under the Confrontation Clause." *Bruton* v. *United States*, 391 U. S. 123, 128, n. 3 (1968) (emphasis added).

The *Bruton* Court attacked the confession's inculpatory effect on the nonconfessing defendant. See *id.*, at 136 ("Not only are the incriminations devastating to the defendant but their credibility is inevitably suspect"). This must be read in the context of its inadmissibility with respect to defendant.[2] The inherent suspicion accorded accomplice testimony is substantially a product of history; in many circumstances accomplice testimony is now given more credence than when *Bruton* was

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2. *Douglas* v. *Alabama*, 380 U. S. 415 (1965) is distinguishable for similar reasons. Douglas' accomplice Loyd, who had signed a written confession, had been tried separately and convicted. *Id.*, at 416. He was called to testify at Douglas' trial while his appeal was still pending, and invoked his self-incrimination privilege each time he was asked about the crime. *Ibid.* Loyd was then declared a hostile witness and his confession, which implicated Douglas, was read to him in the form of a series of questions. This evidence was inadmissible against Douglas under Alabama law, but the state appellate court held that Douglas waived his rights because he had "stopped objecting." *Id.*, at 418. Since Loyd could not be cross-examined on this inadmissible evidence, Douglas' confrontation rights were violated. See *id.*, at 420.

decided. See Part II B, *post*. *Bruton* is a product of its times. If times have changed, so should *Bruton*.

Cruz v. *New York*, 481 U. S. 186 (1987) applies *Bruton* to a narrow issue left unresolved in *Parker* v. *Randolph*, 442 U. S. 62 (1979). In *Parker*, the lead opinion held that where the defendant's and codefendant's confessions confirmed each other, or "interlocked," the codefendant's confession, "will seldom, if ever, be of the 'devastating' character referred to in *Bruton* . . . ." 442 U. S., at 73. Therefore, *Bruton* was unnecessary as the right of cross-examination "has far less practical value to a defendant who has confessed to a crime than to one who has consistently maintained his innocence." *Ibid.*

Cruz rejected this reasoning in a continuation of the assumptions and logic underlying *Bruton*:

> "While 'devastating' practical effect was one of the factors that *Bruton* considered in assessing whether the Confrontation Clause might sometimes require departure from the general rule that jury instructions suffice to exclude improper testimony, 391 U. S., at 136, it did not suggest that the existence of such an effect should be assessed on a case-by-case basis. Rather, that factor was one of the justifications for excepting from the general rule the entire category of codefendant confessions that implicate the defendant in the crime. It is impossible to imagine why there should be excluded from that category, as generally not 'devastating,' codefendant confessions that 'interlock' with the defendant's own confession." 481 U. S., at 191-192.

As *Cruz* was an application of *Bruton*'s analysis, it had to take as a given *Bruton*'s assumption that a defendant's statements against penal interest were generally inadmissible to inculpate a codefendant. The *Cruz* Court did, however, recognize that if this proposition did not hold in certain cases, then *Bruton* would be inapplicable. The *Cruz* Court noted that while the interlocking property of confessions was irrelevant to "*harmfulness*" it was relevant to "*reliability*." See *id.*, at 192 (emphasis in original). While an interlocking confession cannot

make admissible a confession that is not directly admissible, it can at least be part of the "indicia of reliability," to determine whether the codefendant's confession is "directly admissible against the defendant, . . . despite the lack of opportunity for cross-examination . . . ." *Id.*, at 193-194.

Lee v. *Illinois*, 476 U. S. 530 (1986) leaves unanswered the question left open in *Bruton*. *Lee* involved a confession implicating an accomplice that was made under particularly suspicious circumstances. Lee was at the police station in order to identify a badly burned body found in the housing complex in which she lived. *Id.*, at 532. A detective became suspicious when she started to cry as she examined photographs of the body. He read Lee her *Miranda* warnings, and asked her about her missing aunt. Lee eventually admitted that she and her boyfriend, Edwin Thomas, were involved in the stabbing of Lee's Aunt Beedie and her friend Odessa Harris, and that the body was her aunt's. *Ibid.* Lee was arrested and signed a written confession. *Ibid.* In her confession, Lee claimed that Thomas alone killed Odessa by stabbing her in the back, while she killed Aunt Beedie under circumstances strongly suggesting self-defense or a homicide less culpable than murder. See *id.*, at 533-534.

Thomas arrived at the police station as Lee was being interrogated. *Id.*, at 532. Lee had inculpated him enough by that point, however, that the officers advised Thomas of his *Miranda* rights, and then accused him of participating in the murders. *Ibid.* Thomas then stated that " 'he wanted to think about' talking to the police." *Ibid.*

After Lee finished confessing, the police allowed the lovers to meet. As the two kissed and hugged, an officer "asked Lee, in the presence of Thomas, 'what was the statement you had just given us implicating Edwin?' " *Id.*, at 533. After Lee told Thomas that he had said to her that " 'we wouldn't let one or the other take the rap alone,' " Thomas decided to talk. *Ibid.* His statement spread the blame, painting Lee as an active planner and participant in the murders. See *id.*, at 535. The two

were tried jointly without a jury, and both confessions were used against the defendants. See *id.*, at 536-537. The trial judge relied on Thomas' confession for finding Lee guilty of both murders. *Id.*, at 538.

The *Lee* Court rejected the contention that Thomas' confession came under an established hearsay exception.

> "We reject respondent's categorization of the hearsay involved *in this case* as a simple 'declaration against penal interest.' That concept defines too large a class for meaningful Confrontation Clause analysis. We decide this case as a confession by an accomplice which incriminates a criminal defendant." *Id.*, at 544, n. 5 (emphasis added).

Footnote five must be read in the context of the evidence it rejected. The *Lee* Court had strong reason to doubt the veracity of Thomas' statements which effectively shifted the blame to Lee. It noted from the facts that Thomas may well have had a desire to fabricate his story out of retaliation against Lee or in order to spread the blame. *Id.*, at 544. This "theoretical motive" was backed up by the fact that "Thomas contemplated becoming a witness for the State against Lee." *Ibid.*

Thomas' statement is thus best viewed as not being a true declaration against Thomas' penal interest. See M. Graham, Federal Practice and Procedure: Evidence § 6795, p. 806, n. 8 (interim ed. 1992). Simply because some of Thomas' statements may have tended to incriminate him did not render it against his penal interest for the purpose of the hearsay exception. To label Thomas' dubious, blame-spreading statement as against his penal interest "defines too large a class for meaningful Confrontation Clause analysis." *Lee*, 476 U. S., at 544, n. 5. *Lee* only disapproved of an improper use of the penal interest question. The fate of a proper use of this rule is still undetermined.

This conclusion is reinforced by *Williamson* v. *United States*, 512 U. S. 594 (1994). In *Williamson*, Reginald Harris was arrested after a stop and search of his car yielded 19 kilograms of cocaine in two suitcases in the trunk. 512 U. S., at 596. Soon after the arrest, Harris was interviewed over the telephone by Special Agent Walton of the Drug Enforcement Agency. *Ibid.* Harris told Agent Walton that he received the cocaine from an unidentified Cuban in Fort Lauderdale, but that it actually belonged to Williamson and was to be delivered to a particular dumpster that night. *Ibid.* Harris subsequently fleshed out this story in a personal interview with Agent Walton. See *ibid.*

As Agent Walton started to arrange a controlled delivery of the cocaine, Harris changed his story. Harris said that he had lied about the Cuban and other details. *Id.*, at 597. Harris said that the truth was that he was transporting the cocaine to Atlanta for Williamson, who had been travelling in front of Harris in a rental car. Williamson, therefore, had seen Harris' car being searched by police, making a controlled buy impossible. See *ibid.*

Harris said that he lied because he feared Williamson. He did not want his story recorded, and refused to sign a written version of his confession. Walton testified that he made no promise of help to Harris other than reporting any cooperation to the Assistant United States Attorney. See *ibid.*

Harris refused to testify at trial, even after being given immunity and compelled by a contempt order. Therefore, the trial court allowed Agent Walton to relate Harris' story as a statement against penal interest, Fed. Rule Evid. 804(b)(3). *Ibid.* The Court of Appeals affirmed Harris' conviction against a Confrontation Clause attack. *Id.*, at 598.

In a partially divided opinion, the *Williamson* Court established the scope of Rule 804(b)(3). A majority of the Court held that in order to qualify as a statement against penal interest, the statement must be truly inculpatory; collateral statements would not qualify for the hearsay exception, even if linked to other self-inculpatory statements. See *id.*, at 600-601. The majority split over how to apply this holding to the case before the Court. Four of the six justice majority saw Harris' statement as inadmissible on its face as "Harris' arguably

inculpatory statements are too closely intertwined with his self-serving declarations to be ranked as trustworthy," *id.*, at 608 (Ginsburg, J., concurring in part, and concurring in the judgment), but would remand the case for harmless error analysis. *Id.*, at 610. The remaining members of the majority held that case should be vacated and remanded for further findings on whether Harris' statements were "truly self-inculpatory." See *id.*, at 604 (O'Connor, J.). The three remaining justices took a broader approach to Rule 804(b)(3) and would allow in some noninculpatory collateral statements. See *id.*, at 620 (Kennedy, J., concurring in the judgment). This concurrence would remand the case for analysis under its standard. *Id.*, at 621.

Although this case did not reach the Confrontation Clause issue, see *id.*, at 605 (O'Connor, J.), the part of the lead opinion not joined by a majority of the Court hints that statements against penal interest may sometimes inculpate third party defendants without violating the Confrontation Clause. "We note, however, that the very fact that a statement is genuinely self-inculpatory—which our reading of Rule 804(b)(3) requires—is itself one of the 'particularized guarantees of trustworthiness' that makes a statement admissible under the Confrontation Clause." *Ibid.* (citing *Lee*, *supra*, 476 U. S., at 543-545). This statement left undecided the question of whether the statement against interest exception "is 'firmly rooted' for Confrontation Clause purposes." *Ibid.*

Neither of the other opinions generally banished statements against penal interest under Confrontation Clause grounds. Justice Ginsberg's concurrence did cite Confrontation Clause precedents in support of the assertion that statements implicating others have trustworthiness and Confrontation Clause problems. See *id.*, at 608. These concurring justices formed the part of a majority opinion that at least contemplated admitting such statements against codefendants. See *id.*, at 603 (majority). While Justice Kennedy's concurrence does not address the Confrontation Clause, the fact that it takes a broader view than the majority of what is admissible under the penal interest exception, see *id.*, at 616 ("the conclusion reached by the Court today—would 'eviscerate the against penal interest exception' "), strongly implies a willingness to admit at least some statements against penal interest over Confrontation Clause objections.

Williamson did not fix the relationship between statements against penal interest and the Confrontation Clause. The Court was confronted with a statement that in some ways looked even less credible than the one summarily rejected in *Lee*. The confession in *Lee* implicated both defendants equally, see *ante*, at 9; the confession in *Williamson* portrayed Harris as a little fish acting under the direction of the much larger catch, Williams. See *ante*, at 11. Harris' confession contradicted an earlier one he made on several key points, and he refused to make a written statement of it. See *ante*, at 10-11. In spite of this, a majority of this Court was willing to consider the possibility that Harris' unredacted statement was still admissible. See *id.*, at 605 (O'Connor, J.); *id.*, at 621 (Kennedy, J., concurring).

This is a very far distance traveled from a *Bruton* opinion which abruptly dismissed similar evidence in a footnote. See *ante*, at 7. *Williamson* and Rule 804(b)(3) reflect more than a change in federal evidence law. They represent the penal interest exception's coming of age. The now-firm rooting of this doctrine has crucial implications for *Bruton* and the Confrontation Clause it sought to interpret.

II. An appropriately interpreted declaration against penal interest exception is sufficiently firmly rooted to satisfy the Confrontation Clause.

A. The Roberts Rule.

The seemingly straightforward language of the Confrontation Clause ("the accused shall enjoy the right . . . to be confronted with the witnesses against him") creates a problem. Courts seem to have but one of two choices for the Confrontation Clause. At one extreme, the clause would prevent any

hearsay testimony from being admitted against criminal defendants. The other approach distinguished between witnesses and declarants. The Confrontation Clause would apply only to actual witnesses against the defendant. See *Dutton* v. *Evans*, 400 U. S. 74, 95 (1970) (Harlan, J., concurring). Cross-examination of testimonial statements which are given " 'infra-judicially,' " such as dying declarations, would be governed by the law of evidence instead of the Constitution. See *id.*, at 94. Resolving this question is made even more difficult by the relatively scant history concerning the framers' intent behind the words of the Confrontation Clause. See *White* v. *Illinois*, 502 U. S. 346, 359 (1992) (Thomas, J., concurring); *Dutton*, 400 U. S., at 95 (Harlan, J., concurring).

This Court resolved the hearsay dilemma by choosing a third way. It was impractical and unfair to ban a whole body of often trustworthy and highly probative evidence from the prosecution's arsenal. Thus, this Court rejects this approach, which "would abrogate virtually every hearsay exception, . . . as unintended and too extreme." *Ohio* v. *Roberts*, 448 U. S. 56, 63 (1980). Nor has it adopted the limited, physical confrontation approach, see *White*, 502 U. S., at 352, in spite of its formidable adherents and their strong arguments on its behalf. See *Dutton*, 400 U. S., at 93-100 (Harlan, J., concurring); 5 J. Wigmore, Evidence § 1397, p. 159 (Chadbourn rev. 1974). Instead, this Court has found "success in steering a middle course among proposed alternatives" for the Confrontation Clause, *Ohio* v. *Roberts*, 448 U. S., at 68, n. 9, by examining the reliability of the hearsay statement. See *id.*, at 65-66. Therefore, hearsay testimony with sufficient "indicia of reliability" may be admitted against defendant under the Confrontation Clause. See *Mancusi* v. *Stubbs*, 408 U. S. 204, 213 (1972).[3]

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3. This requirement typically also requires the witness to be unavailable. See *ibid.* Sometimes, however, unavailability does not have to be proven. See *Roberts*, 448 U. S., at 65, n. 7. When the *Bruton* rule is at issue, the declarant will typically be unavailable by claiming the self-incrimination privilege. See *Lee* v. *Illinois*, 476 U. S. 530, 549, n. 3 (1986) (Blackmun, J., dissenting).

This approach carries its own burdens. Because this middle way and the hearsay rule serve such similar interests, see *California* v. *Green*, 399 U. S. 149, 155 (1970), and have such similar roots, see *Dutton*, *supra*, 400 U. S., at 86, there is a danger of this Court's confrontation decisions subverting the development of the hearsay rule. See *id.*, at 86, n. 17 (plurality). Although close, the Confrontation Clause and the hearsay rule should not be and are not the same. The states are the primary enforcers of criminal law, see *Patterson* v. *New York*, 432 U. S. 197, 201 (1977), and their rules governing criminal trials should generally be left untouched by the federal courts. See *Harris* v. *Alabama*, 513 U. S. 504, 512 (1995). A case-by-case examination of the individual reliability of each hearsay statement admitted against a defendant would turn the hearsay rule into a quagmire. "Significantly, every jurisdiction has a strong interest in effective law enforcement, and in the development and precise formulation of rules of evidence applicable in criminal proceedings." *Roberts*, 448 U. S., at 64. Turning the Confrontation Clause into a case-by-case statute for the hearsay rule frustrates these compelling interests.

Roberts addressed these concerns. In addition to allowing the state to prove the reliability of hearsay on a case-by-case basis, the *Roberts* Court held that "[r]eliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception." *Id.*, at 66.

This shines a light through the potentially dark muddle of the Confrontation Clause. Focusing on hearsay exceptions comports with how the hearsay rule is applied; a general rule against hearsay subject to numerous specific exceptions.[4] See Fed. Rules Evid. 801-806; 5 J. Wigmore, *supra*, § 1366, at 28-29 (dividing hearsay rule into the rules requirements, its exceptions, nontestimonial utterances to which the rule does not apply, and applying the rule to statements of the tribunal).

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4. The "catch-all" hearsay exception, see, *e.g.*, Fed. Rule Evid. 803(24), is not a firmly rooted exception under *Roberts*. See *Idaho* v. *Wright*, 497 U. S. 805, 817 (1990).

The *Roberts* rule is respectful of, but not wedded to, history. A long recognized exception is more likely to contain sufficient "indicia of reliability" to satisfy the Confrontation Clause. See *Mancusi* v. *Stubbs*, 408 U. S. 204, 213 (1972) (noting long acceptance of prior recorded testimony). Since the hearsay rule, like the Confrontation Clause, is motivated by accuracy, compare *Tennessee* v. *Street*, 471 U. S. 409, 415 (1985) (purpose of Confrontation Clause to advance the accuracy of trials) with 5 Wigmore, *supra*, § 1362, at 3 (purpose of hearsay rule to test assertions of witnesses through cross-examination), common sense dictates that those exceptions which best promote accuracy will survive the test of time.

The Confrontation Clause does not, however, petrify the hearsay rule. The best description of the adaptability that is the essence of this Court's Confrontation Clause jurisprudence comes from *Roberts*. "True to the common-law tradition, the process has been gradual, building on past decisions, *drawing on new experience, and responding to changing conditions*." 448 U. S., at 64 (emphasis added). This is a necessity in a body of law as organic as the law of evidence. "The rules of evidence in the main are based on experience, logic, and common sense, less hampered by history than some parts of the substantive law." *Donnelly* v. *United States*, 228 U. S. 243, 277-278 (1913) (Holmes, J., dissenting). Therefore, "[t]he Court has not sought to 'map out a theory of the Confrontation Clause that would determine the validity of all . . . hearsay exceptions.' " *Roberts*, 448 U. S., at 64-65 (quoting *Green*, *supra*, 399 U. S., at 162).

This Court has upheld many of the hearsay exceptions against Confrontation Clause attack. One of its earliest confrontation cases upheld the dying declaration exception. See *Mattox* v. *United States*, 156 U. S. 237, 243 (1895); see also Fed. Rule Evid. 804(b)(2). The Court has also upheld cross-examined prior testimony, see *Mancusi*, 408 U. S., at 213-216; see also Fed. Rule Evid. 804(b)(1), and the statement of a co-conspirator made in furtherance of the conspiracy. See *Bourjaily* v. *United States*, 483 U. S. 171, 183 (1987); see also Fed. Rule Evid. 801(d)(2)(E).

The one commonly recognized exception that does not satisfy *Roberts* is the residual exception for statements not covered by a specific exception that has "equivalent circumstantial guarantees of trustworthiness . . . ." Fed. Rule Evid. 803(24). In *Idaho* v. *Wright*, 497 U. S. 805, 817 (1990), this Court came to the necessary conclusion that this broad, unspecific standard could not be "a firmly rooted hearsay exception for Confrontation Clause purposes."[5] Unlike a standard hearsay exception, which "satisfies the constitutional requirement of reliability because of the weight accorded longstanding judicial and legislative experience in assessing the trustworthiness of certain types of out-of-court statements," *ibid.*, the residual exception embodied a very different purpose. "The residual hearsay exception, by contrast, accommodates ad hoc instances in which statements not otherwise falling within a recognized hearsay exception might nevertheless be sufficiently reliable to be admissible at trial." *Ibid.* Because this exception is so diffuse, if the Court were "to agree that the admission of hearsay statements under the residual exception automatically passed Confrontation Clause scrutiny, virtually every codified hearsay exception would assume constitutional stature, a step this Court has repeatedly declined to take." *Id.*, at 817-818.

This Court examines hearsay exceptions under the Confrontation Clause through a combination of common sense and a respect for the collective wisdom of legislatures and the courts, which gives its cases a "common-law tradition . . . ." *Roberts*, 448 U. S., at 64. As the next section will demonstrate, declarations against penal interests are now part of that tradition. The rationale behind the exception makes sense, and its common sense is reflected in the many jurisdictions that accept this rule. It is time for this Court to admit declarations against penal interest into the family of firmly rooted hearsay exceptions.

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5. *Wright* dealt with Idaho's residual hearsay exception which was taken verbatim from the Federal Rules of Evidence. See 479 U. S., at 811-812; Idaho Rule Evid. 803(24).

B. The Firmly Rooted Exception.

The law of evidence has now evolved to the point that statements against penal interest can be considered a "firmly rooted" exception to the hearsay rule under *Ohio* v. *Roberts*, 448 U. S. 56, 66 (1980). The sheer common sense of the proposition that people only rarely falsely incriminate themselves is a strong argument for its general acceptance, as Justice Holmes so eloquently explains:

> "The confession of Joe Dick, since deceased, that he committed the murder for which the plaintiff in error was tried, coupled with circumstances pointing to its truth, would have a very strong tendency to make any one outside of a court of justice believe that Donnelly did not commit the crime. I say this, of course, on the supposition that it should be proved that the confession really was made, and that there was no ground for connecting Donnelly with Dick. —The rules of evidence in the main are based on experience, logic, and common sense, less hampered by history than some parts of the substantive law. There is no decision by this court against the admissibility of such a confession; the English cases since the separation of the two countries do not bind us; the exception to the hearsay rule in the case of declarations against interest is well known; no other statement is so much against interest as a confession of murder, it is far more calculated to convince than dying declarations, which would be let in to hang a man, (*Mattox* v. *United States*, 146 U. S. 140); and when we surround the accused with so many safeguards, some of which seem to me excessive, I think we ought to give him the benefit of a fact that, if proved, commonly would have such weight." *Donnelly* v. *United States*, 228 U. S. 243, 277 (1913) (Holmes, J., dissenting).

The declaration against interest exception, like most other exceptions to the hearsay rule, developed in the early eighteenth century. 5 J. Wigmore, Evidence § 1455, p. 323 (Chadbourn rev. 1974). The "arbitrary limit" of this rule to exclude statements against penal interests came about in a poorly argued and reasoned decision of the House of Lords limiting the rule to statements against pecuniary or proprietary interest. See *id.*, at 351; *Sussex Peerage Case*, 11 Cl. & F. 85, 110, 8 Eng. Rep. 1034, 1044 (1844). Although this decision was contrary to previous interpretations of the rule, see Wigmore, at 350, it was accepted in both England and the United States. See *id.*, at 351-352.

This policy was wrong from its inception.

> "Was the practice of excluding third-person confessions in criminal cases justified? It certainly could not be justified on the ground that an acknowledgment of facts rendering one liable to criminal punishment is less trustworthy than acknowledgment of a debt. The motivation for the exclusion was no doubt a different one, namely, the fear of opening the door to a flood of witnesses testifying falsely to confessions that were never made or testifying truthfully to confessions that were false. This fear was based on the likely criminal character of witness and declarant, reinforced by the requirement that declarant must be unavailable, which made perjury easier to accomplish and more difficult to punish." 2 J. Strong, McCormick on Evidence § 318, p. 340 (4th ed. 1992).

The distinction from the other accepted hearsay exceptions was senseless. "This is the ancient rusty weapon that has always been brandished to oppose any reform in the rules of evidence, . . . the argument of danger of abuse. This would be a good argument against admitting any witnesses at all, for it's notorious that some witnesses lie and that it is difficult to avoid being deceived by their lies." 5 Wigmore, *supra*, § 1477, pp. 358-359.

Wigmore and Holmes argued to admit statements against penal interest in the context of third party confessions exonerating criminal defendants. See *id.*, at 359; *Donnelly*, 228 U. S., at 277 (Holmes, J., dissenting). There is no reason inherent to the Confrontation Clause to limit declarations against penal

interest to those exonerating the accused. The Confrontation Clause is concerned with accuracy, see *United States* v. *Inadi*, 475 U. S. 387, 396 (1986), and accuracy is a two-edged sword. If justice is due equally to the accused and accuser, see *Snyder* v. *Massachusetts*, 291 U. S. 97, 122 (1934), then so is accuracy.

The standard modern argument for excluding the inculpatory use of statements against penal interest is that, while under arrest, a codefendant has "strong motivation to implicate the defendant and to exonerate himself" making any statements "about what the defendant said or did are less credible than ordinary hearsay evidence." *Bruton* v. *United States*, 391 U. S. 123, 141 (1968) (White, J., dissenting).

Three related motivations—currying favor, revenge, and exculpation—are most likely to cause someone to implicate another falsely while also implicating oneself. Currying favor from the authorities, a motive recognized by the drafters of rule 804(b)(3), see Advisory Committee's Notes on Fed. Rule Evid. 804, 28 U. S. C. App., p. 790; see also *Williamson* v. *United States*, 512 U. S. 594, 601 (1994), can be identified and addressed by the courts. The requirement that suspects be informed of their rights before custodial interrogation, under *Miranda* v. *Arizona*, 384 U. S. 436 (1966), helps to minimize the threat. The *Miranda* warnings minimize such dangers by informing the suspect "that he is faced with a phase of the adversary system—that he is not in the presence of persons acting solely in his interest." *Id.*, at 469.

Where a defendant has been informed of his rights, and no promises of leniency were made, there is no reason to exclude declarations against penal interest. See, *e.g.*, *Williamson*, 512 U. S., at 620 (Kennedy, J., concurring in judgment); *United States* v. *Garcia*, 897 F. 2d 1413, 1421 (CA7 1990); *United States* v. *Scopo*, 861 F. 2d 339, 348 (CA2 1988). Any problem with efforts to curry favor should therefore be easy to control.

Exculpation and revenge are motives found in *Lee* v. *Illinois*, 476 U. S. 530 (1986). The relative ease with which the *Lee* Court uncovered them demonstrates that these difficulties

are also readily controllable. The bare facts before the Court strongly intimated the unacceptable motives behind Thomas' confession.[6] Revenge was inferred from codefendant Thomas' knowledge that Lee had implicated him, and that he had almost testified for the prosecution. See *id.*, at 544. Thomas' self-exculpatory motive was similarly inferable as the nature of his statement showed a desire to shift blame from himself alone to a shared blame with the person who implicated him. See *ibid.* Separating the hearsay chaff from the declaration against penal interest wheat in this manner is something that courts do routinely. See 2 Strong, *supra*, § 319, p. 346, n. 21 (discussing cases).

With so strong a measure of common sense behind it, it is understandable that the declaration against penal interest is now a "firmly rooted" exception to the hearsay rule. The arguments of Wigmore and Holmes spread throughout the courts, leading to a relaxation of the rule excluding declarations against penal interest. See *id.*, at 340-341. The penal interest exception is now recognized by the federal system, see Fed. Rule Evid. 804(b)(3), and by most of the states. See 5 Wigmore, *supra*, § 1477, pp. 360-362, n. 7, and 1997 Supp., at 587-593. Therefore, declarations against penal interest are "firmly rooted" enough to satisfy *Ohio* v. *Roberts*, *supra*, and the Confrontation Clause. See *United States* v. *Seeley*, 892 F. 2d 1, 2 (CA1 1989) (Breyer, J.); see also *Churro* v. *United States*, 4 F. 3d 436, 437 (CA6 1993); *United States* v. *Nazemian*, 948 F. 2d 522, 530-532 (CA9 1991).

The initial rejection of this exception by the House of Lords, and the initial decision of American courts to follow this accident of history, should not change the analysis. The *Roberts* rule and this Court's other Confrontation Clause cases are marked by a respect, but not reverence, for history. See *ante*, at 16-17. This Court does not use the Confrontation Clause to

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6. For a detailed description of the facts in *Lee*, see *ante*, at 9-10.

stifle needed reforms of the law of evidence with historical baggage.

> "Despite the superficial similarity between the evidentiary rule and the constitutional clause, the Court should not be eager to equate them. Present hearsay law does not merit a permanent niche in the Constitution; indeed, its ripeness for reform is a unifying theme of evidence literature. From Bentham to the authors of the Uniform Rules of Evidence, authorities have agreed that present hearsay law keeps reliable evidence from the courtroom. If *Pointer* has read into the Constitution a hearsay rule of unknown proportions, reformers must grapple not only with centuries of inertia but with a constitutional prohibition as well." *Dutton* v. *Evans*, 400 U. S. 74, 86-87, n. 17 (1970) (plurality) (internal quotations omitted).

The move from the *Sussex Peerage Case* to Rule 804(b)(3) is a needed reform that allows reliable evidence into the courtroom. The Confrontation Clause should not be invoked to squelch it.

III. Because the statement in the present case would qualify as a declaration against penal interest, *Bruton* does not apply.

Before any analysis of Bell's confession as a declaration against penal interest, it is necessary to establish the relevance of attaching this classification to the statement. The confession was not admitted against Gray; the trial court instructed the jury not to consider the confession against Gray. See *State* v. *Gray*, 687 A. 2d 660, 668 (Md. 1997). This does not effect the confession's validity under the Confrontation Clause. The initial decision to admit the confession against Gray as a declaration against penal interest is a question of state, not federal, law. See *Estelle* v. *McGuire*, 502 U. S. 62, 67-68 (1991). Before the trial court's application of *Bruton* can be improper, *Bruton* must apply. If Bell's confession comes within

the declaration against penal interest exception, then it cannot violate the Confrontation Clause, rendering *Bruton* irrelevant.

Maryland did more than it had to when it insulated Gray from Bell's confession. It could have admitted Bell's confession against Gray as a declaration against penal interest without violating the Confrontation Clause. The fact that Gray was given more protection than he was entitled to does not render his conviction unconstitutional.

Bell's confession is a declaration against penal interest. The confession has the appropriate circumstantial indicia of reliability. Bell was read his *Miranda* rights and waived them before confessing. See Joint Appendix ("JA") 54. He was not given any inducements for talking, see *ibid.*, and he received no plea bargain, being charged with the same offenses as Gray. See *id.*, at 14. Such assurances strongly rebut any notion that Bell was motivated to tell anything other than the truth.

The text of the confession is consistent with this reading of Bell's motive. The overwhelming bulk of Bell's statement implicates himself alone or equally with named or anonymous accomplices. See *State* v. *Gray*, 687 A. 2d, at 667-668; *ante*, at 2-3. Even in its unredacted form, the confession does not try to exculpate Bell or shift blame towards Gray.

> "(Q) What can you tell me about the beating of Stacey Williams that occurred on 10 November 1993
>
> "(A) An argument broke out between Tank and Stacey in the 500 bl[oc]k [of] Louden Ave. Stacy got smashed and then ran onto Wildwood Parkway. Me Tank [Vanlandingham], Kevin [Gray (defendant)] and a few other guys ran after Stacey. We caught up to him on Wildwood Parkway. We beat Stacey up. After we beat Stacey up we walked him back to Loudon Ave I then walked over and used the phone. Stacey and the others walked down Loudon
>
> "(Q) When Stacey was beaten on Wildwood Parkway, how was he beaten
>
> "(A) Hit, kicked

"(Q) Who hit and kicked Stacey

"(A) I hit Stacey, he was kicked but I don't know who kicked him

"(Q) Who was in the group that beat Stacey

"(A) Me, Tank, Kevin and a few other guys

"(Q) Do you have the other guys names

"(A) Tank, Kevin and me, I don't remember who was out there

"(Q) Did anyone pick Stacey up and drop him to the ground

"(A) No when I was there.

"(Q) What was the argument over between Stacey and Tank

"(A) Some money that Stacey owed Tank

"(Q) How may guys were hitting on Stacey

"(A) About six guys

"(Q) Do you have a black jacket with Park Heights written on the back

"(A) Yeh

"(Q) Who else has these jacket.

"(A) Tank, Kevin

"(Q) After reading this statement would you sign it

"(A) Yes." J. A. 61-63 (internal references omitted).

Every instance where Gray is inculpated by name, Bell equally inculpates himself. The only subject where Bell does not implicate himself is the reason for the beating, the argument between Tank [Vanlandingham] and the victim, Williams, over money Williams owed Tank. As Gray is not implicated by this statement his confrontation rights are not threatened. "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses *against him* . . . ." U. S. Const.,

Amdt. 6 (emphasis added). Although this passage might not qualify as a declaration against penal interest in the federal courts, see *Williamson* v. *United States*, 512 U. S. 594, 600-601 (1994), a state court may make a contrary interpretation of the rules of evidence without violating the Constitution. See *Estelle* v. *McGuire*, 502 U. S. 62, 67-68, and n. 2 (1991).

Bell may have attempted to protect Gray during the confession. While Bell claims not seeing anyone trying to pick Williams up and throw him down the only eyewitness to testify identified Gray as trying to do this. *Gray*, 687 A. 2d, at 661. This, and the rest of Bell's testimony sharply contrasts with the blatant attempt to shift blame in *Lee* v. *Illinois*, 476 U. S. 530 (1986), see *ante*, at 9, or the declaration in *Williamson* v. *United States*, 512 U. S. 594 (1994). See *ante*, at 11.

The contrast with *Williamson* is particularly telling. As noted earlier, the declarant, Harris, told contradictory stories about Williamson's culpability, first downplaying Williamson's role, then stating that he had lied, and that Williamson was the source of the drugs. See *ante*, at 10-11. Harris' second story, the one admitted at trial, painted Williamson as the leader and Harris as no more than a courier. See *id.*, at 597. In spite of this, the case was remanded to the lower court so that it could determine whether Harris' statement was admissible as a declaration against penal interest. See *id.*, at 604 (O'Connor, J.); *id.*, at 621 (Kennedy, J., concurring).

Bell's confession in the present case is much more clearly self-inculpatory than the one in *Williamson*. Bell does not shift responsibility. Instead, he properly shares it with his accomplices. The sharing of guilt is not a form of exoneration; it reflects the nature of the crime, a savage beating perpetrated by several men. "Moreover, a declarant's statement is not magically transformed from a statement against penal interest into one that is inadmissable merely because the declarant names another person or implicates a possible codefendant." *Id.*, at 606 (Scalia, J., concurring).

Bell, Gray, and others were part of a savage group beating of Stacey Williams, a fact confirmed by the eyewitness testimony. See *Gray*, 687 A. 2d, at 661-662. Implicating Gray and others in Williams' killing was not "in a context where the declarant is minimizing culpability or criminal exposure." *Williamson*, 512 U. S., at 607 (Scalia, J., concurring). It was the truth. Bell's confession was

> "a statement which . . . at the time of its making . . . so far tended to subject the declarant to . . . criminal liability . . . that a reasonable person in the declarant's position would not have made the statement unless believing it to be true." Fed. Rule Evid. 804(b)(3).

Since admitting such a statement does not violate a defendant's confrontation rights, see Part II, *ante*, Gray's right to confrontation has not been violated, no matter how effective the trial court was in redacting his name from Bell's confession.

CONCLUSION

The decision of the Maryland Court of Appeals should be affirmed.

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Respectfully submitted,

CHARLES L. HOBSON

Attorney for Amicus Curiae
Criminal Justice Legal Foundation